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Supreme Court of the United States

OCTOBER TERM, 1956

NO 547

FRANK J. MADDEN, *Petitioner*

versus

SOUTHERN RAILWAY COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
THE FOURTH CIRCUIT

JAMES P. MOZINGO, III
JOHN L. NETTLES
117 N. Main Street
Darlington, S. C.
Attorneys for Petitioner

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OCTOBER TERM, 1956

No.————

FRANK J. MADDEN, *Petitioner*

versus

SOUTHERN RAILWAY COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS THE FOURTH CIRCUIT

The petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on August 4, 1956, and the order of the United States Court of Appeals, dated September 14, 1956, supplemental thereto.

OPINIONS BELOW

The opinion of the District Court (App. 20) on respondent's motion for Change of Venue is reported at 131 F. Supp. 415.

The opinion of the Court of Appeals denying respondent's petition for Writ of Certorari is reported at 224 F. (2d) 430.

The opinion of the Court of Appeals (App. 23)

reversing the District Court is reported at 235 F. (2d) 198.

The supplemental order of the Court of Appeals (App. 34) has been incorporated in the opinion above.

JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 1956.

Petition for rehearing was filed September 7, 1956, and rehearing was denied September 14, 1956.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

CONSTITUTIONAL PROVISION INVOLVED

U. S. Constitution, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law."

QUESTIONS PRESENTED

1. Whether a Federal Appellate Court can review the exercise of a trial court's discretion on a motion for a change of venue when the trial court attempts to follow applicable principles laid down by this court and decides the motion on sound legal principles?

2. Whether inadequacy or excessiveness of a jury verdict is subject to review by Federal Appellate

Courts under the guise of reversing trial courts for abuse of discretion?

3. Whether a Federal Appellate Court may grant a new trial on grounds which were not urged in respondent's motion for a new trial in the trial court?

4. Whether a Federal Appellate Court can reverse a trial court for alleged error committed in the trial court when the party having the right to complain of such error, if any, has waived its right to insist on such error in the trial court or by its actions has estopped itself of the right to claim error?

5. Whether a Federal Appellate Court can reexamine facts tried by a jury, by ignoring evidence in order to limit the application of the doctrine of last clear chance *contra* to the law as announced by the Supreme Court of North Carolina, which controls?

6. Whether a Federal Appellate Court may reverse a trial court for admitting evidence under limited instructions claiming that the jury failed to follow such limiting instructions?

STATEMENT

On the grounds of diversity of citizenship and because the amount in controversy exceeded the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, the petitioner, a citizen of the State of South Carolina, brought the within action against the respondent, a corporation organized and existing under the laws of the State of Virginia, in the District Court for the Eastern District of South Carolina, Columbia Division, for personal injuries received by petitioner on October 9, 1950, in Charlotte, North Caro-

lina, when petitioner lost his left leg and right heel, rendering him totally disabled for gainful employment.

Petitioner at the time of the institution of this action resided in Anderson, S. C., which is 147 miles from Charlotte, N. C., and 117 miles from Columbia, S. C. Charlotte is 94 miles from Columbia, S. C. Petitioner received medical treatment in Florence, S. C., which is eighty (80) miles from Columbia and one hundred and ten (110) miles from Charlotte.

The respondent moved for a change of venue under 28 U. S. C. 1404 (a) and the motion was resisted by petitioner and denied by the district court on the grounds that all persons having knowledge or information relative and material to the issues involved, with the exception of one of respondent's employees, live within subpoena distance of Columbia but not Charlotte, and that petitioner's main medical witness resided in Florence, as well as other material witnesses who are employees of a small hospital located there and that it would be more convenient for the Florence witnesses to attend trial in Columbia rather than Charlotte, among others. (App. 20).

The cause came on for trial before the District Court and a jury at the November term, 1954, and resulted in a verdict of Five Thousand ($5,000.00) Dollars for petitioner. The evidence of petitioner and respondent as to where and how petitioner received his injuries was in great conflict, the petitioner contending that he was hit and knocked down by a moving box car of respondent at a public street crossing, all without warning. The respondent contended that petitioner, in a drunken condition, crawled under one of

respondent's boxcars located on its yard north of the public crossing, in order to get out of the rain after stumbling around in sight of respondent's train crew about respondent's yard, which in and of itself was a dangerous place.

During the trial, petitioner was allowed to introduce two (2) letters written by respondent's claim agent to petitioner (Respondent's App. below, pp. 183, 184) under instructions from the court that such letters were not to be treated as admissions of liability on the part of the respondent. (Petitioner's App. below, p. 57; Respondent's App. below, p. 149.)

The respondent moved for judgment n. o. v. on the ground of petitioner's sole negligence and his contributory negligence, and, in the alternative, for judgment in accordance with the verdict. Coupled with its motion for judgment n. o. v. respondent filed what purported to be a motion for a new trial. However, respondent failed to set forth any grounds therefor, except to ask that if a new trial be granted, that it be granted on all issues. Petitioner contends that such motion was ineffective as a motion for new trial. (Respondent's App. below, pp. 195, 196).

Petitioner moved for a new trial on the issue of damages only. (Petitioner's App. below, p. 68.) Petitioner throughout maintained that he was entitled to a verdict of liability even under respondent's evidence.

The respondent, rather than asking to set the verdict aside, abandoned, in its brief with the trial judge, any right for judgment n. o. v. (See portion of respondent's petition for Writ of Certiorari, App. 23).

Petitioner's motion was granted (Respondent's App. below, p. 196).

After the district court granted petitioner's motion, respondent petitioned for a Writ of Certiorari, which was denied by the Court of Appeals in an opinion reported at 224 F. (2d) 320.

A new trial, on the issue of damages only, resulted in a verdict for petitioner. (Respondent's App. below, p. 210.) Motion to set aside the judgment and for new trial was refused (Respondent's App. below, p. 213) in a rather strong order of Judge Timmerman.

Respondent's appeal to the Court of Appeals followed and its opinion is reported at 235 F. (2d) 198 (App. 23) wherein the Court of Appeals considered alleged errors in the first trial which had been waived by respondent, decided, by its own view of the evidence before the district court on motion for change of venue, that the district court had abused its discretion, held the admission of the two (2) letters prejudicial error in spite of the district court's instructions to the jury thereto, decided that the doctrine of last clear chance could only apply if the evidence showed that petitioner was drunk "on the crossing," thereby ignoring evidence that petitioner was in a helpless position on respondent's track at a place other than the crossing, where he was seen or could have been seen by respondent's servants, agents and employees in the exercise of ordinary care, and finally that the district court abused its discretion in granting a new trial on the question of damages.

REASONS FOR GRANTING THE WRIT

The decision below is not in accord with the applicable decisions of this Court: The decision of the Court below is in conflict with the principles announced by this Court in *Gulf Oil Corp v. Gilbert*, 330 U. S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055, 1062, and *Koster v. Lumbermen's Mutual Cas. Co.*, 330 U. S. 518, 524, — S. Ct. —, 91 L. Ed. 1067, 1074.

Both of these cases involved the issue as to whether the doctrine of *forum non conveniens* should be applied. However, the principles therein announced are likewise applicable to motions for change of venue under 28 U. S. C. 1404 (a).

Upon the record then before the trial court, it refused respondent's motion applying the principles set forth in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508, and *Koster v. Lumbermen's Mutual Cas. Co.*, 330 U. S. 518. The trial court in the exercise of its discretion gave sound legal reasons why the motion should not be granted (App. 20). The court below, second guessing the trial court, differed with the trial judge and concluded that it was not a sound exercise of the trial court's discretion. The court below, exercising its discretion, held that the lower court abused its discretion and in effect nullified the discretion given to the trial court.

Obviously, the court below took it as an affront that the trial court did not follow its advisory opinion at 224 F. (2d) 320, and undertook to reverse the trial court on every exercise of the trial court's discretion by simply stating that the trial court abused its dis-

cretion or failed to make a sound exercise of that discretion. The errors complained of, if any, were harmless.

In passing, it might be stated that the Court of Appeals for the Fourth Circuit, prior to *Neese v. Southern Ry. Co.*, 350 U. S. 77, 76 S. Ct. 131, 100 L. Ed. —, has exhibited a philosophy hostile to large, but not more than adequate, verdicts by reversing the actions of the trial judges in refusing to grant new trials on the factual issue of excessiveness of damages. *Since the announcement by this court in the *Neese* case the decisions of the Fourth Circuit have continued to be permeated with this hostility, but instead of reversing directly on the question of excessiveness, its reversals have been based upon the finding by the Court of Appeals of facts contrary to reasonable inferences determinable by a jury and the evidence of record; †a method which has the effect of making more difficult the possibility of review by this court of a party's constitutional right of trial by jury.

In addition it is apparent that the Court of Appeals

* Virginian Ry. Co. v. Armentrout, 166 F. (2d) 400 1948; U. S. v. Guyer, 218 F. (2d) 266; Ford Motor Co. v. Mahone, 205 F. (2d) 267.

† Alexander v. Alexander, 229 F. (2d) 111 1956. Verdict $175.000.00 actual, $75,000.00 punitive—cut by trial judge to $87,500.00 actual, $75,000.00 punitive. Reversed. Atlantic Coast Line R. Co. v. Collins, — F. (2d) —. Verdict for plaintiff. Reversed (Opinion not yet reported). Blue Ridge Electric Cooperative, Inc. v. James Earl Byrd, Case No. 7183, decided Oct. 1, 1956. Verdict for $126,786.80 for loss of both arms. Reversed. Jack's Cookie Co. v. Brooks, 227 F. (2d) 935 1955. Verdict of $17,500.00 for libel. Reversed. Smith v. Biggs, 223 F. (2d) 839 1955. Verdict of $25,000.00. Reversed.

has exhibited a hostility toward the District Judge who conducted the first trial in the present case. Research beginning at 216 F. (2d) and from information furnished petitioner discloses that the action of this District Judge has been reviewed by the Court of Appeals eleven (11) times in tort actions and it has reversed the District Judge nine (9) times.‡

The action of the court below is also in conflict with *Kennon v. Gilmer*, 9 S. Ct. 696, 131 U. S. 22, 33 L. Ed. 110.

The allowance of the petition would afford this court an opportunity to determine an important question of appellate review and resolve the doubts existing between appellant courts and district courts as

‡ Tallant Transfer Co. v. Bingham, 216 F. (2d) 245 1954. ($7,500.00 verdict for personal injuries affirmed). Southern Ry. Co. v. Neese, 216 F. (2d) 772 1954. ($60,000.00 verdict for death reduced to $50,000.00. Reversed. Certiorari granted and Court of Appeals reversed. Neese v. Southern Ry. Co., 350 U. S. 77, 76 S. Ct. 131, 100 L. Ed. —). Atlantic Coast Line R. Co. v. Smalls, 216 F. (2d) 842 1954. (Verdicts totalling $7,666.00 for personal injuries under FELA reversed, Certiorari granted and Court of Appeals reversed, Smalls v. Atlantic Coast Line R. Co., 75 S. Ct. 439, 348 U. S. 946, 99 L. Ed. 740). Bean v. Piedmont Interstate Fair Assn. 222 F. (2d) 227 1955. (Order dismissing complaint in tort action reversed). Smith v. Biggs, 223 F. (2d) 839 1955 (Verdict of $25,000.00 reversed for plaintiff's contributory negligence as a matter of law). Southern Ry. Co. v. Madden, 224 F. (2d) 320 1955. (Petition for Writ of Certiorari denied but error indicated). Rogers v. O'Reilly, 226 F. (2d) 176 1955. (Automobile collision case, amount of verdict not stated. Affirmed). Jack's Cookie Co. v. Brooks, 227 F. (2d) 935 1955. (Verdict of $17,500.00 for libel reversed). Alexander v. Alexander, 229 F. (2d) 111 1956. (Judgment of $87,500.00 actual, $75,000.00 punitive damages for malicious prosecution reversed) . Southern Ry. Co. v. Madden, 235 F. (2d) 198 1956. (Case at Bar). Blue Ridge Electric Cooperative, Inc. v. James Earl Byrd. (Decision not yet reported). Decided Oct. 1, 1956. Verdict of $126,786.80 reversed.

to when an exercise of discretion is sound or unsound. It would further give this court an opportunity to decide a matter of importance to the fair and efficient administration of justice.

The court below has departed from the usual and accepted course of judicial review: A. The court below has granted a new trial on grounds not set out in respondent's motion for new trial. A District Court may grant a new trial within ten (10) days after judgment on its own motion on any ground, however, after the expiration of ten (10) days such court may grant a new trial only upon grounds urged by a party in a properly written motion for new trial. If, after the expiration of ten (10) days after verdict, a district court does not have power to grant a motion for new trial except upon grounds urged by a party, it follows that a Circuit Court does not have such power. (Federal Rules of Civil Procedure, Rule 7 (b), 59).

The respondent below filed what purported to be a motion for new trial but did not urged any grounds as to why the motion should be granted. (Respondent's App. below, p. 195). The trial court, therefore, had no jurisdiction to grant respondent's motion for new trial. *Fine v. Paramount Pictures* (7th Cir.) 181 F. (2d) 300. The trial court had jurisdiction to grant petitioner's motion for reasons assigned. (Petitioner's App. below, p. 88). Respondent then had no motion for new trial in the trial court. It filed a motion for judgment n. o. v. upon the grounds of petitioner's sole and contributory negligence and, in the alternative, for judgment in accordance with

the verdict. It abandoned the motion for judgment n. o. v.**

The only matters before the trial court were whether the trial court should affirm the verdict or grant petitioner's motion for new trial. Thus, the alleged errors made during the first trial, if any, were waived by respondent.

The trial court was lulled into a position, at the instance of respondent, of not considering the alleged errors, if any. The purpose of a new trial being to give the trial court an opportunity to correct its errors. If such action did not amount to a waiver of the alleged errors, it at least created an estoppel, to prevent respondent from raising the alleged errors in the court below, and it was error for the court below to examine the record for alleged error.

B. The court below, in searching the record for possible error and in disregard to the waiver of error

** The respondent filed a petition for writ of certiorari with the court below after the first trial and after the order granting petitioner's motion for partial new trial. In its petition it stated that it had, in its brief filed with the trial court in support of its motions after trial, abandoned its plea that the verdict be set aside, and had asked only for affirmance of the verdict. The court below could judicially notice its own records and should have. While the proceedings in the court below on respondent's petition for writ of certiorari are not technically a part of the record in the present case, this court should have those proceedings before it for its consideration of petitioner's petition and more particularly if certiorari is granted. To that end, petitioner has requested the clerk of the court below to certify a copy of the proceedings below on respondent's petition for certiorari to the clerk of this court (No. 7034)—Southern Railway Company v. Frank J. Madden). Petitioner has printed the pertinent part of respondent's petition for writ of certiorari as a part of the Appendix to this petition. (App. 23).

by respondent in the trial court, held that the trial court's admission of the two (2) letters written to petitioner by respondent's claim agent constituted reversible error. Thus, the court invaded the province of the jury and found as a fact that the jury disregarded the instructions given them in regard to the admission of such letters.

It must be presumed that the jury followed the instructions of the court as to the reasons for the limited admission of evidence. *Suhay v. U. S.* (10th Cir.) 95 F. (2d) 890, 895; *Baltimore & O. R. Co., v. Felgenhauer* (8th Cir.) 168 F. (2d) 12, 17; *Fiedler v. Chicago & N. W. Ry. Co.* (7th Cir.) 204 F. (2d) 515, 519.

The letters were admitted for a limited purpose, and the jury was expressly charged that they could not regard them as admissions of liability. (Petitioner's App. below, p. 57).

Without giving any reason supported by the record, the court below found that the jury did in fact disregard the trial court's instructions simply because the court thought the jury would most certainly construe the letters as admissions of liability.

The court below, however, in disregard to the waiver of respondent, reviewed the alleged errors occurring in the trial court. Such action on the part of the court below was such a departure from the accepted and usual course in judicial proceedings as to call for the intervention of the power of supervision of this court.

Petitioner submits that if the court below was of the opinion that the trial court abused its discretion,

it should have at least reinstated the verdict of the jury in the first trial.

Existing conflict among the circuits on the issues presented: The issues below included the following: (1) whether a federal appellate court could reexamine the action of the jury by concluding that the verdict was the result of compromise or sympathy, when the trial court had found that the verdict was not; (2) whether or not the trial court abused its discretion in granting a new trial on the issue of damages because of inadequacy; and (3) whether an appellate court could review the action of a trial court on motion for new trial.

The court below has consistently held that it has the power to reexamine verdicts and set them aside when, in its opinion, the verdict was the result of compromise and sympathy. This is accomplished by holding it to be an abuse of discretion on the part of the trial court not to set aside such verdicts. *Southern Railway* v. *Madden*, 224 F. (2d) 320; *Southern Railway v. Madden*, 235 F. (2d) 198; App. 23); *Ford Motor Co.* v. *Mahone*, 205 F. (2d) 267; *Virginian Ry. Co.* v. *Armentrout*, 166 F. (2d) 400; *Schuerholz* v. *Roach*, 58 F. (2d) 32.

The Tenth Circuit holds that jury verdicts may not be upset by speculation or inquiry into whether they were the result of compromise. *Young* v. *United States*, 168 F. (2d) 242.

The Tenth Circuit was considering a jury verdict in a criminal case, but the principle is the same.

The action of the court below in concluding that the verdict was the result of compromise and sympathy,

under the guise of abuse of discretion on the part of the trial court, was but a review of the action of the trial court on the question of inadequacy or excessiveness.

The principle of law applicable to inadequate and excessive verdicts stands upon the same footing, and there is a conflict among the circuits as to whether inadequacy or excessiveness of a verdict is subject to review by federal appellate courts.

In *Weathersbee* v. *Elgin, Joliet and Eastern Ry. Co.* (7th Cir.) 191 F. (2d) 302, the court held it was powerless to review for excessiveness.

The Fourth and Ninth Circuits disagree. *Virginian Ry. Co.* v. *Armentrout*, 166 F. (2d) 400; *Cobb* v. *Lepisto*, 6 F. (2d) 128; *Southern Pac. Co. v. Guthrie*, 186 F. (2d) 926.

The First Circuit: *New York, N. H. & H. R. Co. v. Zermani*, 200 F. (2d) 240; Second Circuit: *Miller v. Maryland Casualty Co.*, 40 F. (2d) 240; Third Circuit: *Scott v. Baltimore & O. R. Co.*, 151 F (2d) 61; and the Eighth Circuit: *St. Louis Southwestern Ry. Co. v. Ferguson*, 182 F. (2d) 849, all agree with the Seventh Circuit.

In the case below the court held that the verdict was the result of compromise solely from the size of the verdict, which is further in conflict with the Seventh Circuit. *Weathersbee v. Elgin, Joliet & Eastern Ry. Co.*, 191 F. (2d) 302, 309.

There is a conflict among the various circuits as to whether the action of a trial court on motion for new trial is reviewable.

The Sixth and Eighth Circuits hold that motion for new trial is addressed to the discretion of the trial court and its action thereon is not reviewable. *Chapman v. Federal Land Bank of Louisville, Ky.*, (6th Cir.) 117 F. (2d) 321; *Emanuel v. Kansas City Title and Trust Co.* (8th Cir.) 127 F. (2d) 175; *Old Colony Trust Co. v. Kurn*, (8th Cir.) 138 F. (2d) 394; *Mill Owner Mut. Fire Ins. Co. v. Kelly*, (8th Cir.) 141 F. (2d) 763; *Waylander-Peterson Co. v. Great Northern Ry. Co.* (8th Cir.) 201 F. (2d) 408; *Kansas City Stock Yards Co. v. Anderson* (8th Cir.) 199 F. (2d) 91.

The Second, Fourth, Fifth, Seventh, Ninth and Tenth Circuits hold *contra: Campbell v. American Foreign S. S. Corp.* (2d Cir.) 116 F. (2d) 926; *Smith v. Gay* (4th Cir.) 190 F. (2d) 719; *Lemley v. Christopherson* (5th Cir.) 150 F. (2d) 291; (Compare *Miller v. Tenn. Gas. Transmission Co.* (5th Cir.) 220 F. (2d) 434); *Jennings v. Murphy* (7th Cir.) 194 F. (2d) 35; *U. S. v. Bransen* (9th Cir.) 142 F. (2d) 232; *Kansas City Public Service Co. v. Shephard* (10th Cir.) 184 F. (2d) 945.

The review by the court below of the action of the trial court on motion for new trial is in conflict with *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 247, 248, 60 S. Ct. 811, 84 L. Ed. 1129, 1181.

The allowance of the petition would afford this court the opportunity to review the problems involved herein in their entirety, and resolve existing conflicts among the circuits, as well as giving guidance to lower courts on important questions of law, and settle an important question of whether or not Federal Appellate Courts have the power to review questions relative to inadequacy and excessiveness of jury verdicts.

The action of the court below is in conflict with the controlling law of the State of North Carolina, as announced by the Supreme Court of North Carolina, on the application of the doctrine of last clear chance, and in reaching its conclusion the court below invaded the province of the jury: The court below, in holding that the doctrine of last clear chance did not apply, under respondent's theory of the case, refused to consider evidence and testimony from which the jury could have and did find that the petitioner was in a dangerous, helpless position at the time he received his injuries and that the agents, servants and employees of the respondent knew of, or should have discovered, petitioner's perilous position in time to avoid the injury.

The court below correctly stated the law of North Carolina to be that in order for the doctrine of last clear chance to apply it must appear that the operatives of the respondent's train either actually saw, or in the exercise of ordinary care in keeping a proper lookout could have seen, petitioner in a position of danger in time to have enabled them, by the exercise of ordinary care, to avoid injuring petitioner. *Osborne v. Norfolk & W. R. Co.*, 233 N. C. 215, 63 S. E. (2d) 147; *Battle v. Southern Railway Co.*, 223 N. C. 395, 26 S. E. (2d) 859. See, also, *Justice v. Railroad*, 219 N. C. 273, 13 S. E. (2d) 553; *Arnold v. Owens*, 78 F. (2d) 495. Having stated the correct law, the court below then chose to ignore evidence that the operatives of respondent's train actually saw petitioner in a place of danger, or could have so seen him by the exercise of ordinary care. One of respondent's witnesses, Yelvington, testified that Buff could have seen anything on the tracks. Buff was riding the lead car in the movement which respondent contends caused

petitioner's injuries, and had a light in his hand sufficient to illuminate the area ahead of the movement (Petitioner's App. below, pp. 40, 41). There was other evidence that a person could be seen all over the yard (Respondent's App. below, p. 105), and that respondent's train crew actually saw petitioner in a drunken condition walking to the point where respondent contends petitioner received his injuries (Petitioner's App. below, pp. 36, 37, 38; Respondent's App. below, pp. 96, 104, 111, 112).

The Constitution of the United States prohibits federal appellate courts from reexamining facts tried by a jury. *U. S. Constitution, Amendment VII.* The court below did reexamine facts tried by a jury. It ignored them and on that basis held that the doctrine of last clear chance did not apply.

Not only did the court below ignore the evidence but further held, contra to the law of North Carolina, that the only possible theory upon which the last clear chance doctrine could have any application to the cause would have been for petitioner to have been in a drunken condition (helpless) "on the crossing". Thus, it limited the law of North Carolina. There is no statutory law or case law in the State of North Carolina limiting the application of the last clear chance doctrine to injuries received on a crossing. Quite to the *contra*, the law of North Carolina allows recovery under the last clear chance doctrine, regardless of where a person is injured, so long as the person injured was in a place of danger and was actually seen or could have been seen by the person causing the injury by the exercise of ordinary care in time to avoid the injury complained of. There is no requirement insofar as railroad injuries are concerned, that

the person injured must be "on the crossing". *Bucker v. Southern R. Co.*, 194 N. C. 104, 138 S. E. 535; *West Const. Co. v. Atlantic Coast Line RR Co.*, 185 N. C. 431, 116 S. E. 3; *Brown v. North Carolina R. Co.*, 172 N. C. 604, 90 S. E. 783; *Pharr v. Southern Ry. Co.*, 119 N. C. 751, 26 S. E. 149; *Ray v. Aberdeen & R. R. Co.*, 141 N. C. 64, 53 S. E. 622.

In effect the court below has correctly stated a principle of law, then ignored evidence, and reexamined facts tried by a jury, and then limited the application of the said principle of law *contra* to the controlling state law.

The allowance of the petition in this case would afford this court an opportunity to review a constitutional violation by the court below, and determine if the Court of Appeals has decided a question of North Carolina law in conflict with the decision of the Supreme Court of the State of North Carolina.

CONCLUSION

Throughout the trials and appeals below petitioner insisted that he is entitled to a verdict under either the petitioner's or the respondent's theory of the case. Therefore, for the foregoing reasons, this petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted.

JAMES P. MOZINGO, III
JOHN L. NETTLES
Attorneys for Petitioner

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APPENDIX

ORDER OF DISTRICT COURT DENYING MOTION FOR CHANGE OF VENUE

The above case is before me upon motion of the defendant to change the venue from the Columbia Division in the Eastern District of South Carolina, to the Charlotte Division in the Western District of North Carolina, under the provisions of 28 USCA 1404(a).

It was conclusively shown at the hearing that it would be for the convenience of the witnesses for the defendant to try the case in the Charlotte Division in the Western District of North Carolina, and that the scene of the accident is in the city limits of the City of Charlotte, not very far from the Federal court house. However, it appears from the affidavit of one of counsel for the plaintiff that the plaintiff is a resident of Anderson, South Carolina, and that all the witnesses who have any knowledge or information relative and material to the issues involved in the cause reside within a radius of one hundred miles of Columbia, South Carolina, and that the Federal Rules of Civil Procedure provide a means of obtaining the presence of all of these witnesses, both for the defendant and the plaintiff, at the trial of the case in Columbia, South Carolina, with the exception of one witness for the defendant who resides in Charleston, South Carolina, but who is an employee of the defendant; that this would not be true if the case had been filed or is tried in Charlotte, North Carolina, inasmuch as the plaintiff's main medical witness resides at Florence, South Carolina, which is located one hundred, ten miles from Charlotte,

North Carolina, and only eighty miles from Columbia, South Carolina; that in addition to the medical doctor, there are several other witnesses employed at Bruce's Hospital in Florence, South Carolina, whom it will be necessary to call as witnesses in the cause; that these witnesses can attend trial in Columbia, South Carolina, much more conveniently, economically and with less loss of time than if they were required to attend trial in Charlotte, North Carolina; that Bruce's Hospital is not a large hospital, and it would seriously handicap the patients in Bruce's Hospital and the other personnel if all of these witnesses had to travel to Charlotte, North Carolina, to give their testimony in that it would leave the hospital short handed during the time that these persons would testify; that in addition to the above mentioned witnesses, there is a photographer that resides in Florence, South Carolina, whose convenience would be better served by trying the case in Columbia, South Carolina, rather than Charlotte, North Carolina; that counsel who represent the plaintiff are not admitted to practice in the Western District of North Carolina, and if the cause is transferred to North Carolina, the transfer would force the plaintiff to employ additional counsel and thus incur a great deal of additional expense in order to have his case tried; that plaintiff is in possession, through his attorneys, of a great number of photographs taken of the scene where plaintiff was injured; that these photographs fairly and adequately depict the scene, thus making it unnecessary to have the jury view the scene; that since the date of the accident plaintiff has been totally disabled from earning a livelihood and that the plaintiff will have to rely upon the subpoena provisions of the Federal Rules of Civil Procedure in order to pro-

cure the attendance of his witnesses at the trial of the case; that the Southern Railway Company is, and was at the time of the accident, doing business in the State of South Carolina, and maintains offices and agents in and near Columbia, South Carolina, which is one of its main terminals in its system.

The motion in this case was made promptly by the defendant, but even so it is my opinion that the case would have to go to the foot of the docket in the Charlotte Division and in such event it is doubtful whether or not it could be tried sooner in the Charlotte Division than in the Columbia Division.

After consideration of the argument of counsel, and the affidavits filed by the parties, I am of the opinion that, while it is for the convenience of the witnesses of the defendant for the case to be tried in the Charlotte Division in the Western District of North Carolina, I cannot say that it is for the convenience of the witnesses for the plaintiff or that the interest of justice would be better served if the within case were tried in the Charlotte Division for the Western District of North Carolina, rather than in the Columbia Division for the Eastern District of South Carolina. Therefore, the motion of the defendant to change the venue in the above entitled case from the Columbia Division in the Eastern District of South Carolina, to the Charlotte Division in the Western District of North Carolina, is denied, and

It is so ordered.

C. C. WYCHE
United States District Judge

Dated:
Spartanburg South Carolina
December 8, 1953.

PORTION OF RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

(17) * * * Your petitioner, rather than asking to set the verdict aside, requested the trial court to sign judgment in accordance with the verdict, abandoning in its brief filed with the trial judge any right for judgment n. o. v.

DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT REVERSING CASE FOR A NEW TRIAL, AND TRANSFERRING THE SAME TO THE WESTERN DISTRICT OF NORTH CAROLINA AT CHARLOTTE

PARKER, Chief Judge:

This is an appeal by a railroad company from a judgment for damages in a personal injury action instituted by a plaintiff who claims to have been injured at the 16th Street crossing of defendant's railroad yard in the City of Charlotte, North Carolina, by cars which he claims were negligently backed without signal or warning. The railroad denies the negligence alleged and contends that plaintiff's injuries resulted from his having crawled, while drunk, under cars standing above the crossing which were moved without reason on the part of its employees to apprehend that plaintiff was in a position of peril. Plaintiff sustained serious injuries, his left leg being cut off between knee and ankle and the heel of his right foot being severed.

The case was twice tried. On the first trial the jury found a general verdict in favor of plaintiff in the sum of $5,000. The trial judge allowed this verdict to

stand in so far as it established liability on the part of defendant but set it aside in so far as it fixed the amount of damages, awarding a new trial on the issue of damages alone. On the new trial so awarded the jury found damages in the sum of $75,000; and from judgment for that amount the railroad company has appealed. Five questions are presented by the appeal: (1) whether there was an abuse of discretion in not transferring the case to Charlotte, North Carolina, for trial; (2) whether the evidence was sufficient to take the case to the jury on the question of liability; (3) whether there was prejudicial error in admitting in evidence letters of the railroad's claim agent written in connection with attempted compromise of the case; (4) whether there was prejudicial error in the charge of the judge to the jury on the first trial; and (5) whether the judge was acting within the proper limits of a sound discretion in setting aside the verdict as to the amount of damages and awarding a new trial on the issue of damages alone.

On the question of transfer, it appeared not only that the plaintiff's injury occurred in Charlotte, North Carolina, and that the question of liability was governed by North Carolina law, but also that all of the witnesses to the occurrence and to the treatment of plaintiff in a Charlotte hospital following his injury lived in Charlotte, except one who had moved to West Virginia, and that a view of the locus in quo by the jury, which would be of importance in the trial of the case, could reasonably be had only if the case were tried in Charlotte. Furthermore, it appeared that the plaintiff was not a resident of Columbia, S. C., where the case was brought, or even in that judicial district, but of Greenville, S. C., a town in another judicial dis-

trict and much farther distant from Columbia than from Charlotte, and that no one would be convenienced by a trial in Columbia except plaintiff's attorneys, a photographer who lived in Florence, S. C., and who had been employed to take photographs of the Charlotte railroad yard, and a surgeon and hospital attendants in a Florence hospital where plaintiff had been treated several months after his injury. The question of transfer under 28 USC 1404 (a) was, of course, a matter resting in the sound discretion of the District Judge; but we cannot imagine a case more clearly calling for the exercise of the power of transfer conferred by the statute; and not to transfer it was, we think, not a sound exercise of discretion.

The motion for direction of verdict was properly denied. While there was strong evidence in support of defendant's contention as to how the injury occurred including a number of admissions by plaintiff himself, the rule is well settled that, on motion for directed verdict, the evidence must be accepted in the light most favorable to plaintiff and, when so accepted, the testimony of plaintiff that he was struck at a street crossing by cars which were being negligently backed across the crossing without signal or warning, cannot be ignored and unquestionably presented questions of fact for the consideration of the jury both on the issues of negligence and contributory negligence.

We think, however, that there was prejudicial error in the admission of the letters of the claim agent relating to a compromise of the case. It is too well settled for argument that evidence of unaccepted offers of compromise or negotiations looking to compromise is inadmissible. *Home Ins. Co.* v. *Baltimore Warehouse Co.* 93 U. S. 527, 548; *Arnold* v. *Owens* 78

F. 2d 495, 497; *Penn Dixie Lines* v. *Grannick* 238 N. C. 552, 78 S. E. 2d 410, 413 and cases there cited. Plaintiff admits the correctness of the rule as stated but contends that the letters were admissible to corroborate the evidence of plaintiff and to contradict the evidence of defendant's claim agent as to the circumstance under which a written statement was given by plaintiff, and that the court instructed the jury that the letters were not to be considered as offers of compromise. He further contends that, at all events, their admission was not prejudicial. We are not impressed by any of these contentions.

Plaintiff was injured on the 9th day of October, 1950. On December 30, 1950, he was discharged from the hospital in Charlotte. Just prior to his discharge he gave to defendant's claim agent a written statement to the effect that his injury occurred as a result of his squatting beneath one of a string of cars several hundred feet north of the 16th Street crossing to get out of the rain, and that he was knocked down and run over when the cars were moved. He testified that he signed this statement on the promise of the claim agent that he, the claim agent, would pay plaintiff's hospital bill so that he could be discharged from the hospital. The claim agent denied this; and the letters were admitted for the purpose of corroborating plaintiff and contradicting the agent as to this matter. They had no tendency, however, either to corroborate plaintiff or contradict the claim agent. They were written March 26 and March 28, 1951, and clearly related to nothing except an attempt to compromise the case. In the letter of March 26 the claim agent said:

> "I talked with my big boss about you last week. I am having a tough time trying to get what I want

> for you, but I am still trying. I am writing back to the Washington office about you, today. I will let you hear from me again in a week or so."

In the letter of March 28, he said:

> "Today I made a little headway, and got a little more money. I would like to talk with you again, when you feel like coming to Charlotte."

And we cannot agree that the error in the admission of the letters was harmless. They would almost certainly be construed by the jury as an admission by the claim agent that the defendant was liable to plaintiff in some amount; and, in all probabililty, they constituted the basis upon which the jury arrived at a verdict of $5,000 for an injury which obviously called for a verdict in a much larger amount if there was liability. The jury may well have been unwilling to award plaintiff nothing when it appeared that the claim agent of the defendant was endeavoring to induce defendant to settle with him for his injury.

Coming to the charge of the court, we think there was error in submitting the doctrine of the last clear chance to the jury in the manner in which it was submitted, and in modifying and refusing instructions asked by the defendant which would have kept the jury from misapplying that doctrine. The last clear chance doctrine was applicable neither on the plaintiff's contention as to the facts nor upon the contention of defendant. For the doctrine to be applicable it must have appeared that the operatives of the defendant's train either actually saw, or in the exercise of ordinary care in keeping a proper lookout could have seen, plaintiff in a position of danger in time to

have enabled them by the exercise of ordinary care to avoid injurying him. *Osborne* v. *Norfolk & W. R. Co.* 233 N. C. 215, 63 S. E. 2d 147; *Battle* v. *Southern Railway Co.* 223 N. C. 395, 26 S. E. 2d 859. Here, according to plaintiff's contention, he was walking along a fully lighted street crossing, sober and in full possession of his faculties, when he was struck by cars being backed without signal or warning. The last clear chance doctrine would have no application in such situation, for on the facts as contended, plaintiff would not be in a helpless position and those in charge of the cars would have had no reason to think that he would walk in front of them. See *Long* v. *Norfolk & W. R. Co.* 222 N. C. 523, 23 S. E. 2d 849; *Wagoner v. North Carolina Railroad Co.* 238 N. C. 162, 77 S. E. 2d 701, 710. On the defendant's contention as to the facts, there would be no ground for the application of the doctrine, for there is no evidence whatever to support the contention that those operating the train could have seen plaintiff who had crawled under a box car several hundred feet from the crossing to get out of the rain. See *Hammers* v. *Colorado, Southern, N. O. & Pac. R. Co.* 128 La. 648, 55 So. 4, 39 L.R.A. (N.S.) 685; *Watts* v. *Seaboard Air Line Railroad* 167 N. C. 345, 83 S. E. 615.

The only possible theory upon which the last clear chance doctrine could have any application in the case is that plaintiff was in such a drunken condition on the crossing as to be oblivious to the approach of the backing cars and that a proper lookout by those in charge of the cars would have discovered him in a position of danger in time to protect him against injury. No evidence was introduced by either side to sustain such theory and the jury under the instruction of the

court was at liberty to apply the last clear chance doctrine to an entirely different situation, i.e. to the situation in which the plaintiff was under the cars north of the crossing, a situation to which it could have no possible application on the evidence before the court. In evident attempt to guard against such misuse of the doctrine, defendant requested the court to give the jury the following instruction:

> "11. That if the jury finds that the plaintiff, who had no duty to perform for the defendant, Southern Railway Company, went upon its yard and onto a live track while under the influence of whiskey, and placed himself under a box car, and between the rails, that he would be guilty of contributory negligence and could not recover and it would be the duty of the jury to find for the defendant."

The court gave this charge but modified it by charging, "But, it is for you to determine from all the evidence in the case whether he did that, and it is also for you to determine in connection with my other charge in the case as to whether or not the agents of the defendant knew the plaintiff was in a helpless condition." There is absolutely no evidence to sustain a contention that any of defendant's employees operating its train knew that plaintiff was under one of its cars in a helpless condition, or that he was in such a position that he could have been seen by those operating the train. There is evidence that more than an hour before the injury other employees saw plaintiff elsewhere in its yard in an intoxicated condition; but this was not sufficient to invoke the last clear chance doctrine with respect to the backing of the cars that caused his injury, nor did it impose upon the em-

ployees of defendant the duty of searching under cars in its yard before moving them, on the chance that plaintiff in his intoxicated condition might have crawled under them.

The court refused to give the 12th prayer for instruction requested by defendant, which was as follows:

> "The Court charges the jury that if the plaintiff walked north across 16th Street between the second and third tracks in the way and manner as testified to by defendant's witnesses and continued in a northerly direction into the defendant's yards, and at a time when the defendant was operating its engine in a southerly direction south of 16th Street, that there was no duty imposed by law upon the defendant, or its agents, to thereafter look under standing box cars on its yard north of 16th Street, to ascertain if p'aintiff was under the same before coupling to said cars and moving the same, and that the defendant would not be guilty of negligence in attaching to said standing cars and moving the same."

This requested instruction correctly stated the law applicable to the evidence relied on by defendant and it should have been given. *Watts* v. *Seaboard Air Line Railroad, supra,* 167 N. C. 345, 83 S. E. 615; *Papich* v. *Chicago M. & St. P. Rwy. Co.* 183 Iowa 601, 167 N. W. 686; *Hammers* v. *Colorado, Southern, N. O. & Pac. R. R. Co.* 128 La. 648, 55 So. 4, 34 L.R.A. (N.S.) 685; 44 Am. Jur. p. 652; 75 C.J.S. p. 310. The case of *Buckner* v. *Southern R. Co.* 194 N. C. 104, 138 S. E. 535, is not in point, for there the car which was moved was one which the employees of a shipper had

been engaged in unloading and the employees of defendant knew that they were in or about the car when they moved it. The case was distinguished by the court from the Watts case, supra, on this ground.

In this connection we think that another error in the charge consisted in changing defendant's second prayer for instructions relating to contributory negligence of plaintiff in placing himself under a car on a live track. Defendant requested the court to charge as follows:

> "The Court charges the Jury that from all the evidence offered by plaintiff and defendant, the various railroad tracks located North and South of 16th Street crossing were what is known in railroad parlance, and in law, as 'live tracks', and the Court further charges the Jury that one who enters in and upon a live track and places himself under a car located and standing on the track, is guilty of contributory negligence as a matter of law."

The court changed this instruction as follows:

> "2. The Court charges the jury that from all the evidence offered by plaintiff and defendant, the various railroad tracks located North and South of 16th Street crossing were what is known in railroad parlance, and in law, as 'live tracks'—that means tracks that are more or less continuously in use—and the Court further charges the jury that when one who is in possession of his senses and faculties enters in and upon a live track that is continuously in use, and places himself under a car located and standing on the

track, he is guilty of contributory negligence as a matter of law."

It was error to make this modification for the reason that the interpretation of "full possession of senses and faculties" could only have been interpreted as meaning that the rule would not apply to plaintiff if he was not in full possession of them by reason of drunkenness, and it is well settled that drunkenness does not mitigate contributory negligence, but a drunken man is held to the same standard of care as a sober man. 38 Am. Jur. p. 883-884; *Smith* v. *Norfolk & Southern R. Co.* 114 N. C. 728, 19 S. E. 863.

On the question of granting a new trail on the issue of damages while allowing the verdict to stand as establishing liability on the part of the defendant, little need be added to what we said as to that matter in denying the defendant's petition for writ of certiorari. See *Southern Railway Co.* v. *Madden* 4 Cir. 224 F. 2d 320. The facts were fully before us when that decision was rendered and what was there said had the most careful consideration. The subsequent trial on the issue of damages, resulting in a verdict of $75,000, merely serves to emphasize that the verdict of $5,000 was not merely totally inadequate but could have been rendered only as a sympathy or compromise verdict and could not reasonably have been rendered if the jury had found real liability on the part of defendant. To allow such a verdict to stand as establishing liability while granting a new trial on the issue of damages alone is, in our opinion, not sustainable as a sound exercise of discretion.

What was said by Chief Justice Rugg of Massachusetts in *Simmons* v. *Fish* 210 Mass. 563, 97 N. E. 102,

quoted by us with approval in our prior opinion and in *Schuerholz* v. *Roach* 4 Cir. 58 F. 2d 32, we regard as a sound statement of the law applicable and as dispositive of the question before us, viz.:

> " 'It is inconceivable that any jury, having agreed upon the issue of liability, should have reached such a determination as to damages. They had no right to consider the subject of damages until they had settled the liability in favor of the plaintiff. The verdict itself is almost conclusive demonstration that it was the result not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision. The inference is irresistible that it could have been reached only by certain of the panel conceding their conscientious belief that the defendant ought to prevail upon the merits in order that a decision might be reached. It is possible that a trial judge might let such a verdict stand for various reasons, as for instance if on the whole it should appear to him that a verdict for the defendant ought not to have been set aside. But it would be a gross injustice to set aside such a verdict as to damages alone against the protest of a defendant, and force him to a new trial with the issue of liability closed against him when it is obvious that no jury had ever decided that issue against him on justifiable grounds. Although the decision of a motion for a new trial rests within the discretion of the trial court * * * it is a sound judicial and not an arbitrary discretion which must be exercised. A failure in this regard is subject to revision.' "

See also *Rawle* v. *McIlhenny* 163 Va. 735, 177 S. E. 214, 221.

For the reasons stated the judgment below will be reversed and the case will be remanded for a new trial on all issues and with direction that it be transferred for trial to the Western District of North Carolina at Charlotte.

Reversed.

ORDER ON PETITION FOR REHEARING CORRECTION PRIOR DECISION

Upon consideration of the petition for rehearing in the above entitled case, it is ordered that the word "Greenville" in line 15 of page 3 of the opinion as printed be changed to "Anderson" and that in lines 16 and 17 the language "and much farther distant from Columbia than from Charlotte" be stricken out, and in lieu thereof there be inserted the following langage: "approximately as far from Columbia as from Charlotte," and that the word "full" in lines 12 and 14 of page 10 be stricken out; and the Court being of opinion that the petition for rehearing is otherwise entirely without merit, it is ordered that same be and it is hereby denied.

JOHN J. PARKER
Chief Judge, Fourth Circuit
MORRIS A. SOPER
United States Circuit Judge
A. D. BARKSDALE
United States District Judge

R. M. F. WILLIAMS, JR. *Clerk*

Filed Sept. 14, 1956

A true copy: Teste:
s/ Richard M. F. Williams, Jr., Clerk
U. S. Court of Appeals for Fourth Circuit

FILED
DEC 1 1956
JOHN T. FEY, Clerk

In The

SUPREME COURT of the UNITED STATES

OCTOBER TERM 1956

NO. 547

FRANK J. MADDEN,
Petitioner,

Versus

SOUTHERN RAILWAY COMPANY,
Respondent

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AND APPENDIX

JOHN GREGG MCMASTER
Suite 1000 Security Federal Bldg.
Columbia, S. C.

GEO. H. WARD
HAROLD K. BENNETT
319 Legal Building
Asheville, N. C.

Attorneys for Respondent.

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In The
SUPREME COURT of the UNITED STATES
OCTOBER TERM 1956

NO. 547

FRANK J. MADDEN,
Petitioner,

Versus

SOUTHERN RAILWAY COMPANY,
Respondent

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The respondent opposes the issuance of a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on August 4, 1956, and the Order of the United States Court of Appeals dated September 14, 1956, supplemental thereto.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit denying respondent's petition for writ of certiorari is reported in 224 F.(2d) 320. The Petition for Certiorari incorrectly cited this opinion as appears on page one of the Petition for Certiorari.

STATEMENT

Respondent insists that the questions formulated by petitioner, set forth on pages 2 and 3 of his petition, do not arise on the record. After a brief statement of the case, respondent poses the questions presented.

The allegations of the complaint, plaintiff's own testimony, completely contradicted by physical facts and other testimony, were that he was struck by a freight car being backed across 16th Street crossing in Charlotte, N. C. on October 9, 1950, at 1:30 A.M.; that he entered on the tracks on 12th Street crossing, walked North on the intervening space, 13 feet in width, between tracks 2 and 3 (from the West) to 16th Street crossing. Before reaching 16th Street crossing, he passed several box cars standing on track 3 to his right, no engine attached; that he reached 16th Street crossing, turned East, to his right, and when he entered upon the first track (No. 3 from the West side of the yard), standing in an upright position, he was struck by one of the cars he had passed standing on track 3 just South of 16th Street crossing. The car had no lights, no bell or whistle signal was given, with no look-out on the car or crossing; that he was knocked down; that he caught an airhose under the car and was dragged by the car going North, struck a pile of cinders which knocked him off,

causing his left leg to be severed below the knee and severing his right heel; that the car stopped and he crawled out from under it, and toward 16th Street crossing, near which he was found. Plaintiff testified that he was not drinking and was in full possession of his faculties. No other witness was offered by petitioner as to the way and manner the accident happened.

Respondent, through its train crew and others, established that just before midnight a train crew, engaged in shifting movements on the North Charlotte yard, completed shifting movements North of 16th Street, and went South on the main track No. 3 (from the West), this being the first movement South that night. The engine proceeded South over the crossing, at which time, upon leaving the crossing, a flagman and two switchmen were stationed on the crossing to look out for pedestrians and cars. These three, together with the fireman operating the engine, and the engineer, testified that shortly after midnight, as they approached 16th Street crossing from the North, they saw a man dressed as plaintiff was, bareheaded, in his shirt sleeves, in the rain, approaching 16th Street crossing from the South, walking on the intervening space, 13 feet in width, between tracks 2 and 3 (from the West); that he was staggering and cursed one of the employees who warned him of the dangers of the railroad yards. He continued North over the crossing and into the North and West part of the yard, on the intervening space between said tracks. At this time the engine continued South on the main line. No shifting movement was made on the crossing, except when the three crewmen were on the crossing to protect pedestrians and vehicles using it. These witnesses testified that no one was hit or injured on the 16th Street crossing that night and that no shifting was done on the

portion of the yard into which the man was last seen to disappear. The crossing was well lighted—street, flood and tower lights, as well as lights on the switching engine.

The respondent offered in evidence a scale model of the railroad yards, admitted by petitioner to be correct, showing eleven parallel tracks crossing 16th Street.

At approximately 1 A.M. the engine moved from South of 16th Street on the third track (from the East) (separated by five tracks, with intervening space between each track, from where petitioner testified he was struck)—three men were on the crossing keeping a lookout for pedestrians and cars. One of the three caught the lead car as it approached and before it reached 16th Street and rode over the crossing into the North yard, where the car coupled to other cars standing on the third track (from the East) 400 to 500 feet North of the crossing. The engine was then detached from the cars and crossed back on track No. 3 (from the East) over 16th Street crossing and continued to the switch connecting track No. 3 (from the East) with the main line, at a point near 12th Street crossing. The engine with no cars attached, and the train crew, then went North on the main line (Track No. 3 from the West) with headlights burning, crossed 16th Street into the North yard and did not return to 16th Street crossing that night.

About this time petitioner was discovered on the intervening space between *tracks 2 and 3 from the East*, near the crossing. Charlotte policemen and others arrived before the ambulance. Inspection by them disclosed that a trail of blood led from the point where petitioner was discovered, North 400 to 500 feet into the yard *on the intervening space* between tracks 2 and 3 (from the East), terminating at a point where between the rails of track 3 (from the East),

within a radius of two feet, were found under a box car, a puddle of blood, two shoes, petitioner's severed limb, a bottle of whiskey, a key, a two-cell flashlight and small coins. There was no blood between the rails of track 3 (from the East) other than a puddle of blood at the point where petitioner's personal effects were found. The box car under which the personal effects were found, was shown to have been the box car to which the train crew coupled and left standing when they made their last trip into the North yard on the 3rd track (from the East—five tracks removed from track 3 from the West where petitioner testified he was struck). This movement over the crossing at which time a flagman rode the lead car, leaving two men on the crossing until the coupling was completed, was made approximately one hour after respondent's employees saw petitioner go into the North yard on the intervening space between tracks 2 and 3 (from the West).

When petitioner was found by a yard clerk, who summoned aid, he was rational. He told police officers that he went under a box car to get out of the rain; that a train hooked up to it and ran over his foot (See Report of Police Officers made on the night of the accident to the Charlotte Police Department (Appellant's Appendix C.C.A. No. 7196, Page 182—Appendix this Brief 60). He was taken to the hospital where he remained until December 31. During that time he repeated the statement theretofore made to the officers, to his doctor, nurses and fellow patients, and to the claim agent of Southern Railway, as late as the day he left the hospital—that he was drinking and went under the box car to get out of the rain, when it was coupled and ran over his foot.

On the day he left the hospital, December 31, 1950, he

gave the claim agent of the railroad a written statement (Appendix this Brief Page 61) that he walked from 12th Street to 16th Street, crossed 16th Street and went North 700 feet into the yard and determined he had passed 16th Street and started back and that *"it had started to rain so hard that I had to look for shelter and the only place to get out of the rain was under the end of the box car."*

Petitioner told his neighbors and others, from the date of the accident to the time he instituted the action (nearly three years after the accident) that he was drinking, went under the end of a box car in the yard to get out of the rain, and when it was coupled it cut off his leg. Six witnesses in all testified for respondent as to petitioner's statements as to how the accident happened. Plaintiff was not recalled to deny any statement that he had made to any of the witnesses above.

In apt time, respondent moved for transfer of the action from the United States District Court for the Eastern District of South Carolina, Columbia Division to the United States District Court, Western District of North Carolina, Charlotte Division, setting forth as grounds that petitioner resided outside the District and Division in which the venue was laid, and that respondent was a non-resident corporation, and further setting forth that the accident out of which the action arose took place in Charlotte, N. C., in the Charlotte Division of the Western District of North Carolina; and, that the convenience of witnesses and parties, and the ends of justice would best be served by transfer. The motion was supported by affidavits setting forth that two Charlotte police officers, 11 employees of respondent, two employees of Spartex Mill, Charlotte, N. C., where petitioner had been employed, petitioner's doctors

and nurses, were all material witnesses and resided in Charlotte where the accident occurred, and where the hospital records of petitioner's treatment, were located, and where the railroad yards could be viewed by the jury and the Court, and that the cost to respondent to try the case in Columbia would be almost three times that of the cost of trial in Charlotte, and that petitioner was a resident of Anderson, South Carolina, which is in the Western District of South Carolina and about the same distance from Charlotte as from Columbia in the Eastern District of South Carolina (Appellant's Appendix C.C.A. No. 7196, Pages 12-25 inclusive).

In opposition to the motion, petitioner did not state where his residence was at the time of the institution of the action, and offered affidavits to the effect that petitioner had been later attended by a doctor in Florence, South Carolina, and that a photographer of Florence, who had taken pictures of the railroad yards, resided in Florence, and that both of these persons were material witnesses.

The trial Judge denied respondent's motion for transfer of the case (Appellant's Appendix C.C.A. No. 7196, Page 25).

Approximately three months after petitioner's discharge from the Charlotte Hospital one of respondent's employees, Claim Agent Doggett, wrote two letters to petitioner, the first saying in substance that he had talked to his employer about petitioner's case and was having a tough time trying to get what he (Doggett) wanted for petitioner, but was writing to the Washington office on that date, and the second letter reporting to petitioner that Doggett had made a little headway and got a little more money, and requesting

a conference with petitioner. These two letters (Appellant's Appendix C.C.A. No. 7196, Pages 183-184 — Appendix this Brief 58), were admitted by the trial judge over respondent's objection.

Respondent requested the trial judge to charge the jury that petitioner would be guilty of contributory negligence if he went upon respondent's live track under the influence of whiskey and placed himself under a box car between the rails. The trial judge gave this instruction, but added to it the following: "it is for you to determine from all the evidence in the case, whether he did that, and it is also for you to determine in connection with my other charge in the case, as to whether or not the agents of the defendant knew the plaintiff was in a helpless condition." (Appendix to Petition for Certiorari Page 29.)

There was no evidence indicating that respondent had any knowledge of petitioner's being in a perilous or helpless condition at the time the movement in question was made, or that he was in such position that he could have been seen by the operators of the train. (Appendix to Petition for Certiorari Page 29.)

The Court declined to give instructions requested in writing by respondent to the effect that under the facts in this case respondent was under no duty to look under standing box cars on its yard North of 16th Street to ascertain; if plaintiff were under the same before coupling to and moving said cars, and that respondent would not be guilty of negligence in moving same under those conditions. (Appendix to Petition for Certiorari Page 30.)

Respondent requested the Court, in writing, among other requests, to charge as follows:

"The Court charges the Jury that from all the evidence offered by plaintiff and defendant, the various railroad tracks located North and South of 16th Street crossing were what is known in railroad parlance, and in law, as 'live tracks', and the Court further charges the Jury that one who enters in and upon a live track and places himself under a car located and standing on the track, is guilty of contributory negligence as a matter of law."

The Court changed this instruction by adding the following:

"The Court further charges the Jury that when one is in possession of his senses and faculties enters in and upon a live track that is continuously in use, and places himself under a car located and standing on the track, he is guilty of contributory negligence as a matter of law."

(Appendix to Petition for Certiorari Pages 31 and 32.)

The Jury returned a general verdict in the amount of $5,000 in favor of petitioner. Thereafter, petitioner moved to set aside the verdict as to damages only, whereupon respondent moved in the alternative for: (1) Judgment N.O.V. (2) failing in this, for judgment in accordance with the verdict; (3) failing in this, that if a new trial should be granted, it be granted as to all issues. (Appellant's Appendix C.C.A. No. 7196, Page 195—Appendix to this Brief Page 33).

The trial judge denied respondent's motion in full and granted petitioner's motion awarding a new trial limited to

the issue of damages. (Appendix to this Brief Page 35).

To the signing of the judgment overruling respondent's motions in the alternative above stated, respondent duly excepted (Appellant's Appendix C.C.A. No. 7196, Page 198—Appendix to this Brief Page 37), and also gave notice of appeal to the United States Court of Appeals, reserving its right to perfect its appeal from the denial of respondent's motions, and from the allowance of petitioner's motion, following entry of final judgment in the United States District Court. (Appellant's Appendix C.C.A. No. 7196, Page 199—Appendix to this Brief, Page 39.)

Thereafter respondent petitioned to the United States Court of Appeals for the Fourth Circuit for the issuance of a Writ of Certiorari to the United States District Court, for the reason that the trial judge committed an abuse of discretion in awarding a new trial limited to the issue of damages.

The United States Court of Appeals denied the petition for Writ of Certiorari (Appendix to this Brief Page 39), but stated that all of the judges were of the opinion that on the record in the case the verdict should not have been set aside as to damages without being set aside in its entirety; "and that this will be held for reversible error if the case should thereafter come before us on appeal from final judgment."

Thereafter respondent moved in the United States District Court that the Court reconsider its order previously made awarding a limited new trial, and that the order be modified by setting aside the verdict in its entirety in ac-

cordance with the decision of the United States Court of Appeals. (Appellant's Appendix C.C.A. No. 7196, Page 199—Appendix this Brief Page 44.)

The same trial judge denied respondent's motion to reconsider and refused to follow the opinion of the United States Court of Appeals. (Appellant's Appendix C.C.A. No. 7196 Page 200—Appendix this Brief Page 46.) Respondent duly objected and excepted to the order denying the motion to reconsider, reserving its right to bring forward said objection and exception after final judgment. Appellant's Appendix C.C.A. No. 7196, Page 201—Appendix this Brief Page 47.)

A second motion to reconsider the order previously entered was made by respondent, and same was again denied. (Appellant's Appendix C.C.A. No. 7196, Pages 202 and 205—Appendix this Brief 49-50.)

Trial on the single issue of damages was had, resulting in a verdict in favor of petitioner for $75,000.00. (Appellant's Appendix C.C.A. No. 7196, Page 210.)

Respondent moved that the verdict and judgment be set aside and for a new trial, which motion was again denied and respondent again excepted. (Appellant's Appendix C.C.A. No. 7196 Pages 211 and 215—Appendix this Brief Pages 50-51-52.) Respondent then gave notice of appeal to the United States Court of Appeals from all orders and actions of the trial judge, the verdict of the jury, and all judgments previously entered. (Appellant's Appendix C.C.A. No. 7196, Page 216—Appendix this Brief Page 55.)

QUESTIONS PRESENTED

Should this Court grant the extra-ordinary Writ of Certiorari to review an interlocutory order of the United States Court of Appeals in a negligence action, in which no Federal Question arises, and in which order the United States Court of Appeals directed a new trial on all issues, for errors of law committed by the trial judge in the admission of evidence, instructions to the jury, in awarding a new trial limited to damages, and in refusing to transfer the cause for the convenience of witnesses and parties, and to meet the ends of justice?

REASONS FOR DENYING PETITION FOR WRIT

I

THE RULING AND DECISIONS OF THE UNITED STATES COURT OF APPEALS ARE IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT

and

THE UNITED STATES COURT OF APPEALS FOLLOWED THE APPLICABLE NORTH CAROLINA DECISIONS ON THE DOCTRINE OF LAST CLEAR CHANCE

The Order of the United States Court of Appeals is interlocutory, since it awards a new trial on all issues, among other reasons, for errors committed by the trial judge, in admitting over respondent's objection, two letters of claim agent Doggett (Appellant's Appendix C.C.A. No. 7196, Pages 183-184, Appendix this Brief, Page 58), and in erroneously instructing the jury and permitting the jury to improperly apply the Doctrine of Last Clear Chance.

If the United States Court of Appeals was correct in or-

dering a new trial for the reasons stated above, the remaining grounds advanced by petitioner why writ should be granted are untenable, error, if any, as to the remaining grounds becoming harmless.

A. Letters of Claim Agent Doggett

The letters in question were dated March 25, and March 28, 1951, each written approximately three months after petitioner gave Doggett a written statement on the date of his discharge from the hospital, which statement reiterated his previous admissions absolving respondent from liability. The trial judge admitted these letters as being relevant to the question of whether the written statement signed by petitioner was induced by Doggett's alleged promise to take care of his hospital bills, testified by petitioner to have been made to induce him to sign the statement. The trial judge admitted these letters, over respondent's objection, holding (1) that they tended to corroborate petitioner as to the alleged inducement offered by Doggett for petitioner's execution of the written statement, and (2) that they tended to impeach the testimony of Doggett.

The United States Court of Appeals properly held these letters inadmissible on either of these theories, saying:

> "They had no tendency, however, either to corroborate plaintiff or contradict the claim agent. They were written March 26, and March 28, 1951, and clearly related to nothing but an attempt to compromise the case —and we can not agree that the error in the admission of the letters was harmless. They would almost certainly be construed by the jury as an admission by the claim agent that the defendant was liable to plaintiff

> in some amount; and, in all probability they constituted the basis upon which the jury arrived at a verdict of $5000 for an injury which obviously called for a verdict in a much larger amount if there was liability."
>
> *Southern Railway Co.* v. *Madden,* 235 F. (2d) 198.

There was no inconsistency between the claim agent's testimony that he did not agree to pay petitioner's hospital bill and the statement contained in his letters that he was attempting to get more money for the petitioner. To be admissible for impeachment purposes, there must be real inconsistency between two assertions of the witness. Wigmore on Evidence (2d Ed.) Vol. 2, page 491.

The letters did not corroborate petitioner for the reason that a witness can not be corroborated by the statements of another person but only by his own statements or conduct.

These letters were clearly inadmissible under the doctrine announced by Soper, J., in *Arnold* vs. *Owens,* 78 F. (2d) 494:

> "A voluntary offer of compromise made upon an impulse of benevolence and sympathy may not be considered an admission of culpable causation . . . it is a general rule that an offer of compromise is privileged."

It is obvious that there was no admission of fault contained in the letters; that compromise was their subject, and that the letters contained no reference to payment of hospital bills. The admission of the letters made at the end of a contested trial on the issue of liability, was undoubtedly a deciding factor in influencing the jury to give a compro-

mise or sympathy verdict of $5,000.00.

The United States Court of Appeals, in holding that the letters reflected an attempt to compromise the case, had before it the overwhelming evidence of non-liability, and was following the general rule and applicable decisions of all courts to the effect that offers of compromise are not competent, *Arnold* v. *Owens, supra,* in which many authorities are collected. Petitioner argues that it must be presumed that the jury followed the instructions of the Court as to the reasons for the limited admission of evidence, and cites cases in support of this proposition. These cases are not in point for they deal with a situation where evidence is admissible for a limited purpose, but inadmissible for other purposes. In this case the evidence was not proper or admissible for any purpose.

B. Instructions of the Trial Judge—Misapplying Doctrine of Last Clear Chance:

Respondent, in apt time, requested the Court in writing to hold that the doctrine of Last Clear Chance did not apply either on petitioner's state of facts, or upon the state of facts arising upon respondent's proof. (Appellant's Appendix C.C.A. No. 7196 Page 185. See Page 187.)

After respondent had introduced evidence and overwhelmed the petitioner with evidence that he had gone North over 16th Street Crossing, on the West side thereof, and that the accident did not happen on the crossing, and, as shown by his own statements both written and oral that he crawled under a box car 400 to 500 feet North and East of the crossing, to get out of the rain, the Court, at the request of petitioner, invoked and attempted to apply the doc-

trine of Last Clear Chance, permitting the jury, without evidence, to say by their verdict that petitioner was under a box car, and that respondent knew or should have known that he was under the car in time to avoid the injury, even though respondent was under no duty to look under the car and did not look under the car. Exception was duly taken to the Court's action both in charging and in refusing to charge.

According to petitioner's testimony, he was injured by being struck by a moving train which had no look-out, while he was crossing 16th Street crossing, not under the influence of intoxicants, in an upright position, and in full possession of his faculties.

According to respondent's evidence, corroborated by petitioner's written statement given to the Claim Agent, and by his statement to some five other witnesses, and the physical facts, petitioner was injured after he, in a drunken condition, crawled under a standing box car, in respondent's railroad yards, 400 to 500 feet North of the crossing, to get out of the rain, five tracks removed from the track on which petitioner testified he was struck, when a train coupled to the car and caused him to be run over.

It is not denied that petitioner was prone upon the track under the box car when run over, but the record is silent as to when he became prone upon the track under the box car. The evidence is uncontradicted that petitioner could not have been seen under the box car by any member of the train crew. His dismembered limb and personal effects were found under a box car 500 feet North of the crossing on the 3rd track (from the East) one and one-half hour after he was seen to go North over the crossing on the interven-

ing space between tracks 2 and 3 (from the West). The record is silent as to petitioner's whereabouts during the one hour interval between the time he was seen going North on the West side of the yard and the hour of 1 A.M. when the train crew made the shifting movement on the 3rd track from the East.

If petitioner's version is correct, respondent was guilty of sole negligence and the doctrine of Last Clear Chance would not apply. If respondent's version is correct, petitioner was guilty of sole negligence and the doctrine would not apply. The Doctrine is founded upon the existence of three elements set forth in *Justice* vs. *Railroad,* 219 N.C. 273, 13 S.E.(2d)553:

1. That at the time the injured party was struck by a train of defendant he was down, in an apparently helpless condition on the track,

2. That the engineer saw or by the exercise of ordinary care in keeping a proper lookout could have seen the injured party in such condition in time to have stopped the train before striking him, and

3. That the engineer failed to exercise such care, as the proximate result of which the injury occurred.

Further quoting from the *Justice case, supra:*

"Since there is no evidence as to how long the intestate was prone upon the track, the jury could not have found that the engineer saw, or by the exercise of ordinary care could have seen him in such position and condition in time to have stopped the train before striking him."

The United States Court of Appeals, in following the *Justice case, supra,* was supported by a long line of North Carolina and Federal authorities holding that the Doctrine does not arise until it appears that the injured party has been guilty of contributory negligence:

> *Cummings* v. *Railroad,* 217 N.C. 131, 6 S.E. (2d) 837
>
> *Redmon* v. *Railroad,* 195 N.C. 764, 143 S.E. 829
>
> *Davis* v. *Railroad,* 187 N.C. 147 (151), 120 S.E. 827
>
> *Wheelock* v. *Clay,* 13 F. (2d) 972
>
> *Dowdy* v. *Railroad,* 237 N.C. 519, 75 S.E. (2d) 639
>
> "Peril and the discovery of peril of such person in time to avoid injury constitute the backlog of the doctrine of Last Clear Chance."
>
> *Miller* v. *Railroad,* 205 N.C. 19, 169 S.E. 811
>
> *Stover* v. *Railroad,* 208 N.C. 495, 181 S.E. 336

As stated in *St. Louis & S. F. Ry.* vs. *Schumacker,* 152 U.S. 77, 38 L.Ed. 361

> "The doctrine does not apply where there is no negligence of the defendant supervening subsequently to that of the plaintiff, as where his negligence is continuing and operative down to the moment of the injury."

Under respondent's version of the accident, petitioner's negligence in placing himself under the box car was continuing and operative down to the moment of his injury.

All of the physical facts show that petitioner was not dragged; that there was no trail of blood between the rails, and that a puddle of blood, together with his personal effects were found within a radius of two feet between the rails, under the box car.

Closely allied with the errors committed by the trial Judge in misapplication of the doctrine of Last Clear Chance, was his refusal to charge the Jury upon request by respondent, that the employees of respondent, after seeing petitioner cross 16th Street crossing and go into the yards, were under no duty to thereafter look under standing box cars on respondent's yard North of 16th Street, to ascertain if petitioner was under the same before coupling to and moving said cars, and that respondent would not be guilty of negligence in attaching to said cars and moving the same.

This requested instruction was held by the United States Court of Appeals to contain a correct statement of the law, applicable to respondent's evidence, under the authority of *Watts* v. *Seaboard Airline Ry. Co.* 167 N.C. 345, and numerous other authorities cited by the Court in *Railway* v. *Madden* 235 F. (2d) 198.

The United States Court of Appeals properly held that such requested instruction should have been given by the trial Judge, and drew a valid distinction between the instant case and the case of *Buckner* v. *Railroad,* 194 N.C., 10 4, 135 S.E. 535, upon which authority petitioner now relies in this Court. *The Buckner case* was held not to be in point for the reason that there the car which was moved was one which the shipper's employees had been engaged in unloading, and the railroad's employees knew that they were in or about the car when the engine coupled to it, thus causing

the injury to shipper's employee, Buckner. In the instant case, there is no evidence that respondent's employees knew, or should have known of petitioner's presence under the standing box car at the time the engine coupled to it, the only evidence being that approximately one hour prior thereto petitioner was seen after crossing 16th Street crossing on the extreme Western side of the yard, to disappear into the North and westerly portion of the yard at a time, when respondent was engaged in operating its engine South of the crossing. When it next crossed 16th Street an hour later it entered the extreme Eastern part of the yard.

Respondent requested the trial Judge to charge the jury that the tracks located North and South of the crossing were "live tracks" and that one who enters on a live track and places himself under a car standing on that track is contributorily negligent as a matter of law. The Court gave this requested instruction but prefaced it with the words: "one who is in possession of his senses and faculties and enters", etc.

The vice of the instruction as given was that it permitted the jury to excuse petitioner's voluntary intoxication and exonerate him of his own negligence. This, when coupled with the erroneous instructions as to the applicability of the Last Clear Chance Doctrine permitted the jury to misapply the doctrine of Last Clear Chance by finding that even though petitioner was in a drunken condition, and did go under a standing box car in the yard, he might still recover, although there was no evidence that respondent had any knowledge of his presence under the car.

It is well settled that the law of negligence does not put a premium on voluntary drunkenness and the conduct of an

intoxicated man is judged by the same standard of care as that applied to the conduct of a sober man.

38 Am. Jur. 683, Section 36; and, 38 Am. Jur. Section 203, 883-884.

Smith v. *Norfolk Southern* 114 N.C. 728, 19 S.E. 863

Petitioner invokes the jurisdiction of this Court by stating that Amendment VII of the United States Constitution is involved, and accuses the United States Court of Appeals of having reexamined facts tried by a jury, "ignoring them and on that basis held that the doctrine of Last Clear Chance did not apply". Petitioner also argues that the action of the United States Court of Appeals is in conflict with the controlling law of North Carolina, as announced by the Supreme Court of North Carolina on the application of the doctrine of Last Clear Chance.

It is clear that the United States Court of Appeals explicitly followed the controlling decisions of the Supreme Court of North Carolina in holding that the facts did not justify application of the doctrine of Last Clear Chance on any view of the evidence.

The United States Court of Appeals did not reexamine facts tried by the Jury, nor did it ignore facts in evidence in the case, but to the contrary, held that the facts in evidence did not call for the application of the doctrine of Last Clear Chance, the material elements set forth in *Justice* v. *Railroad,* supra, not being present under any version of the evidence. For these reasons no constitutional question or provision is involved in this petition for Writ of Certiorari.

II

The United States Court of Appeals Did Not Depart from the Usual and Accepted Course of Judicial Review

Petitioner advances the novel argument that because respondent, at the conclusion of the first trial on the merits in the United States District Court moved for a new trial, it was thereafter estopped or precluded from carrying forward exceptions to errors of law committed by the trial Judge in the course of the trial.

It is a principle of law too well settled for argument, that a motion for new trial is addressed to the discretion of the trial Judge, whereas an appeal for errors of law assigned and to be assigned is a matter of right.

39 Am. Jur. 199, Section 201.

A motion for a new trial is a request for a reexamination in the same Court of an issue of fact after trial, and the object of such motion for new trial is to procure the reexamination of such issue of fact.

39 Am. Jur. 42, Section 17.

Upon refusal of the trial court to reexamine the issue of fact in the same Court, movant is then left his remedy by appeal to upset the result in the trial court, by establishing that prejudicial error of law has been committed during the trial.

Upon the coming in of the verdict, the respondent moved in the alternative for judgment N.O.V., for judgment in accordance with the verdict of the jury, or for new trial as

to all issues in the case. The motion for new trial as to all issues in the case was addressed to the sound judicial discretion of the trial judge, and he denied it.

For the convenience of the Court, and for the purpose of showing this Court that respondent has not waived its right to appeal from each of the actions of the trial court, and has not changed its position in any respect as contended by petitioner, all motions for new trial, orders, exceptions thereto, notices of appeal, and motions to reconsider, are made a part of the appendix to this Opposition Brief. (Pgs. 27-43 inclusive)

Petitioner argues that since under the Federal Rules of Civil Procedure a District Court does not have power to grant a motion for new trial except upon grounds urged by a party, it follows that a Circuit Court does not have such power. It is evident petitioner is laboring under the impression that the United States Court of Appeals ruled upon respondent's motion for new trial. This is not the case, since the United States Court of Appeals awarded a new trial on all issues after final judgment, for errors of law committed by the trial Judge. An order of a District Court granting or refusing a new trial is not appealable or reviewable. The majority of the Courts, including this Court, deny the right to review upon the ground that the granting or refusing of a motion for a new trial filed after general verdict is largely a matter of discretion. 2 Am. Jur. 908, Section 101, wherein is footnoted a long line of decisions of the Supreme Court of the United States to this effect.

An examination of the record in the United States Court of Appeals will show conclusively that respondent properly assigned errors of law committed by the trial judge upon

appeal from a final judgment, at its first opportunity to present the same to an appellate Court. (See Appendix to this Brief 57-58.)

Petitioner cites the case of *Fine* v. *Paramount Pictures,* 7th Circuit, 181 F. (2d) 300 in support of his argument that respondent waived its right to appeal from final judgment by failing to urge special grounds in motion for new trial. This case clearly recognizes that appeal may be taken from final judgment after motion for new trial has been made in which motion no reasons were assigned. In the *Fine case, supra,* the Court held that where no motion for new trial assigning reasons therefor, was filed and served, and no reason in support of oral motion was assigned within ten days after entry of judgment, the motion was insufficient, and, therefore, *time for taking appeal* (emphasis added), is to be computed from entry of judgment rather than from date upon which the oral motion for new trial was denied.

Rule 73 of the Federal Rules of Civil Procedure (a) clearly recognizes the right to appeal, following denial of motion for new trial under rule 59, by providing that the running of the time for appeal is to be computed from the entry of any of several orders made upon timely motion under such rules, including an order denying motion for a new trial under rule 59.

Respondent could not appeal to the United States Court of Appeals until final judgment was entered, and when final judgment was entered, respondent, in apt time, did appeal from all errors of law committed by the trial court during the trial, and from rulings on the various motions. See Notice of Appeal (Appendix to this Brief P. 55). Also

see Errors assigned in the United States Court of Appeals. (Appendix to this Brief 57-58).

To show conclusively that respondent has waived no rights to assign errors, we call attention to the opinion of the United States Court of Appeals denying certiorari following the trial Judge's Order awarding a limited new trial, wherein the United States Court of Appeals held "that although it had reviewed the entire record, it could not entertain the questions raised therein by respondent until appeal from final judgment was perfected.

Railway v. *Madden* 224 F. (2d) 320 (Appendix to this Brief 39.)

III

There Is No Conflict Among The Circuits On The Issues Presented In This Case

As previously argued, the question of conflict among the Circuits as to the right of a Circuit Court to review a trial Judge's ruling for setting aside a verdict for inadequacy or excessiveness, becomes purely academic in the light of the errors of law committed by the trial Judge in the admission of the letters of Claim Agent Doggett and the trial Judge's instructions given, and requested instructions refused to be given, to the jury.

It is respondent's view that the case of *Affolder* v. *N.Y.C. & St.L.R.Co.* 339 U.S. 96, 94 L.Ed. 683, resolved this question, since the Court in that case did review the question of excessiveness of the jury's verdict and stated:

"We agree with the Court of Appeals that the amount

> of damages awarded by the District Court's Judgment is not monstrous in the circumstances of this case."

Thus it appears that this Court has reviewed the action both of the District Court Judge and the United States Court of Appeals in this regard.

If there were any difficulty with this question prior to the *Affolder case, supra,* no such difficulty should arise since the enactment in 1948 of the new Judicial Code, 28 U.S. C.A. Section 2106 as follows:

> "The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, set aside, or reverse *any* (emphasis added) judgment, decree or order of a Court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

As to whether the trial Judge actually did abuse his discretion in the instant case in setting aside the verdict of $5000. and awarding petitioner a new trial on the issue of damages only, thus leaving fixed the issue of liability against the respondent, one needs only to refer to the opinion of the United States Court of Appeals in *Railway* v. *Madden* 224 F. (2d) 320 (Appendix to this Brief 39), and to the case of *Railway* v. *Madden* 235 Fed. (2d) 198.

In the per curiam opinion first cited, an unanimous Court stated:

> "All the judges of this court are of the opinion that on

> the record in this case the verdict should not have been set aside as to damages, without being set aside in its entirety."

In the second opinion cited, an unanimous court, referring to the first opinion (224 F. (2d) 320) again reiterated that the facts were fully before the court when the first decision was rendered and what was there said had the most careful consideration, and further said:

> "The subsequent trial on the issue of damages, resulting in a verdict of $75,000 merely serves to emphasize that the verdict of $5000 was not merely totally inadequate but could have been rendered only as a sympathy or compromise verdict and could not reasonably have been rendered, if the jury had found real liability on the part of defendant."

It was a gross abuse of discretion, without parallel in the reported cases for the trial judge to deny respondent a jury trial on the question of liability in view of the evidence—the three men on the crossing positively testifying that petitioner was not injured on the crossing; six witnesses testifying that petitioner stated to them that while drinking, he had gone under a box car in the yard north of the crossing to get out of the rain, which testimony was corroborated by petitioner's written statement given to the claim agent, the physical facts, uncontradicted, as to where the dismembered part of petitioner's foot and leg and personal effects were found, and petitioner's failure to again take the stand and deny one statement he had made to police officers, his doctors, nurses, friends and acquaintances as to his going under the car while drinking.

On the record before it, had the United States Court of Appeals failed to rectify the injustice, it would have violated the provisions of the new Judicial Code, 28 U.S.C.A. Section 2106, supra, in failing to order done what was just under the circumstances.

In view of the widely known reputation for integrity of the members of the United States Court of Appeals for the Fourth Circuit, we refrain from commenting on petitioner's personal references to the members of that Court regarding their alleged hostility toward the District Judge who conducted this trial.

IV

The United States Court of Appeals Had Authority to Order New Trial on All Issues and to Transfer to the Western District of North Carolina, Where Cause of Action Arose

The United States Court of Appeals, on the record, by precedent and by virtue of the provisions of the new Judicial Code 28 U.S.C.A. Section 2106, had authority to remand the case for new trial on all issues and had authority to direct that the case be removed from the Eastern District of South Carolina, Columbia Division to the Western District of North Carolina, Charlotte Division for trial.

Respondent, in apt time, filed its petition and motion for transfer of the cause from the Eastern District of South Carolina, Columbia Division to the Western District of North Carolina, Charlotte Division, where the accident

happened, for the convenience of the parties and witnesses and in the interest of justice.

The petition and motion for removal were supported by affidavits containing the facts set forth on pages 5 and 6 of this brief, and as set forth in full in Appellant's Appendix CCA 7196 Pages 13-25 inclusive.

Petitioner remained in the hospital in Charlotte, where the accident happened, for a period of 83 days. During this period he related to Police Officers of the City of Charlotte, to his doctors, nurses and fellow patients, while in the hospital, the way and manner in which the accident happened, stating that while drinking, he went under a box car to get out of the rain, and when the train coupled to the car it ran over him, all in contradiction of his testimony given on the trial. All of the Police Department and hospital and doctors' records were in Charlotte. All the witnesses who knew these facts lived in Charlotte. The site of the accident, where the same could be inspected by the jury under the orders of the Court, was in Charlotte. Petitioner himself did not live in the judicial district in which the suit was instituted, and Charlotte in the Western District of North Carolina, was as convenient to petitioner's home in Anderson, Western District of South Carolina, as Columbia in the Eastern District of South Carolina, where the suit was instituted.

The index to the Court Reporter's transcript of evidence shows that on the first trial of the action at the November 1954 Term, when the verdict of $5000 was rendered, petitioner used, in addition to himself and wife, only two witnesses, one of whom lived in Charlotte, N. C. where the

accident happened, and the other, a doctor he consulted in Florence, S. C. after he was discharged from the hospital in Charlotte.

At the same term of Court, the record shows, respondent used 14 witnesses—11 of whom were from Charlotte, where the medical and police records were, and where the site of the accident was located.

On the second trial, limited to the issue of damages, where respondent's defense was cut off, petitioner as will be shown by the record, used only himself and wife as witnesses, and the respondent offered no evidence.

We appreciate the fact that on the question of abuse of discretion we must take the record as it appeared before the Court when the motion for change of venue was heard. The Court at that time had before it the petition, supported by affidavits, and as stated in the unanimous opinion of the United States Court of Appeals: "We can not imagine a case more clearly calling for the exercise of the power of transfer conferred by statute and not to transfer it was, we think, not a sound exercise of discretion."

In connection with what is said above, the language used by this Court in the case of *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 91 L.Ed. 1055 is very appropriate here:

> "There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the State law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws and in law foreign to itself."

The case, for various errors committed by the District Judge goes back to the District Court for trial on all issues. No final judgment has been entered. In the case of *United States Alkali Export Association* vs. *United States* 325 U. S. 196, 65 Sup. Ct. 1120, 89 L.Ed. 1554, it is said:

> "The writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ, is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal review."

See: *Roche* v. *Evaporated Milk Assn.* 319 U.S. 30, 87 L.Ed. 1192.

In *Pickwick-Greyhound Lines* v. *Shattuck*, 61 F. (2d) 485, C.C.A. 10, (1932) the court said:

> "Certiorari goes only to the jurisdiction. It does not go to any errors of judgment that may have been committed by the justice in the progress of the exercise of that jurisdiction."

In the final analysis, this case is nothing more than an ordinary common law negligence case arising under the law of the State of North Carolina. It is not based on any Federal statute and no constitutional question is involved. Furthermore, no question sought to be raised by petitioner can be considered by this court until final judgment has been rendered.

We submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN GREGG MCMASTER
Suite 1000 Security Federal Bldg.
Columbia, S. C.

GEO. H. WARD
HAROLD K. BENNETT
319 Legal Building
Asheville, N. C.

Attorneys for Respondent.

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NO. 547

FRANK J. MADDEN,
Petitioner

versus

SOUTHERN RAILWAY COMPANY,
Respondent

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C.A. No. 3938

FRANK J. MADDEN,
Plaintiff

-vs-

SOUTHERN RAILWAY COMPANY, A CORPORATION,
Defendant

NOTICE FOR JUDGMENT NON OBSTANTE VEREDICTO OR FOR NEW TRIAL

The Defendant herein moves for judgment notwithstanding the verdict, or failing therein for a new trial, upon the following grounds:

AS TO JUDGMENT N. O. V.

1. That upon all the evidence, any injury which the plaintiff sustained was directly and proximately caused and brought about by reason of the plaintiff's own negligence and contributory negligence, and that upon all of the evidence, plaintiff is not entitled to recover in this action.

2. Failing in the above, the defendant moves the Court for judgment in accordance with the verdict of the jury.

AS TO MOTION FOR NEW TRIAL

3. Failing in the above motion for judgment notwithstanding the verdict, the defendant moves that if a new trial is granted, that it be granted as to all of the issues in the case.

JOHN GREGG McMASTER
GEO. H. WARD
Attorneys for Defendant
710 Palmetto Bldg.
Columbia, S. C.

Columbia, S.C.
Nov. 15, 1954

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
SOUTH CAROLINA
COLUMBIA DIVISION

C.A. 3938

Frank J. Madden,
Plaintiff,

v.

Southern Railway Company,
a Corporation,
Defendant

ORDER

The above case is now before me upon motion of the defendant for judgment notwithstanding the verdict, or failing therein for a new trial, upon the following grounds: "As to Judgment N.O.V. 1. That upon all the evidence, any injury which the plaintiff sustained was directly and proximately caused and brought about by reason of the plaintiff's own negligence and contributory negligence, and that upon all of the evidence, plaintiff is not entitled to recover in this action. 2. Failing in the above, the defendant moves the Court for judgment in accordance with the verdict of the jury. As to Motion for New Trial. 3. Fail-

ing in the above motion for judgment notwithstanding the verdict, the defendant moves that if a new trial is granted, that it be granted as to all of the issues in the case."

The case is also before me upon motion of the plaintiff for a new trial on the issue of damages only on the ground that the damages awarded in the verdict are inadequate.

After careful consideration of the written briefs submitted by agreement of the parties upon the motions, I am of the opinion that the motions of the defendant should be denied, and

IT IS SO ORDERED.

In my opinion the award of the jury under the evidence was entirely inadequate; and I cannot say that the award was the result of a compromise of the jury on the question of negligence, or based upon sympathy, as claimed by the defendant. I am of the opinion that plaintiff's motion for a new trial, limited to the issue of damages, should be granted, and

IT IS SO ORDERED.

See Rule 59 (a), Rules of Civil Procedure; *Southern Railway Company vs. Neese,* (CCA 4) 216 F. 2d 772 (Cert. granted .....)

/s/ C. C. WYCHE
United States District Judge

Dated: Spartanburg, South Carolina
April 29, 1955.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
SOUTH CAROLINA
COLUMBIA DIVISION

C. A. 3938

FRANK J. MADDEN,
PLAINTIFF,

v.

SOUTHERN RAILWAY COMPANY, a
Corporation,
DEFENDANT.

EXCEPTIONS TO ORDER GRANTING LIMITED NEW TRIAL

The defendant, Southern Railway Company, makes objections and exceptions to the order of the Honorable C. C. Wyche, U. S. District Judge, dated April 29, 1955, as follows:

To the denial of the defendant's motion for judgment in accordance with the verdict of the Jury, the defendant objects and excepts.

To the denial of the motion of the defendant that should a new trial be granted, that it be granted as to all of the issues in the case, the defendant objects and excepts.

To the granting of the plaintiff's motion for a new trial on the issue of damages only, the defendant objects and excepts.

This the 12 day of May, 1955.

John Gregg McMaster
George H. Ward

Attorneys for Defendant,
Southern Railway Company

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
SOUTH CAROLINA
COLUMBIA DIVISION

C. A. 3938

FRANK J. MADDEN,
PLAINTIFF,

v.

SOUTHERN RAILWAY COMPANY, a
Corporation,
DEFENDANT.

NOTICE OF APPEAL

Now comes the defendant, Southern Railway Company, following entry of the order of the Honorable C. C. Wyche, U. S. District Judge, dated April 29, 1955, denying the motion of the defendant for judgment in accordance with the verdict of the Jury, and failing in that motion, that if a new trial be granted, that it be granted as to all the issues in the case, and following the allowance of the motion of the plaintiff for a new trial limited to the issue of damages alone, and gives Notice of Appeal to the U. S. Circuit Court of Appeals for the Fourth Circuit, preserving its right to perfect its appeal from said denial of defendant's motions, and the allowance of plaintiff's motion, should it be so advised, following entry of final judgment in the U. S. District Court.

This the 12 day of May, 1955.

JOHN GREGG McMASTER
GEORGE H. WARD
Attorneys for Defendant
Southern Railway Company

SOUTHERN RAILWAY COMPANY,
Petitioner

vs.

FRANK J. MADDEN,
Respondent.

No. 7034

United States Court of Appeals
Fourth Circuit

Argued June 15, 1955

Decided July 14, 1955.

Proceeding on petition for writ of certiorari to review order of United States District Court for the Eastern District of South Carolina, at Columbia, Charles C. Wyche, J., granting new trial as to damages in personal injury case while permitting remainder of verdict establishing liability to stand. The Court of Appeals, Per Curiam, held that such order was not final order in case and was not appealable.

Petition denied.

See also, 131 F.Supp. 415

1. Courts 405 (12.17)

Order of federal District Court granting new trial in personal injury case as to damages while permitting remainder of verdict establishing liability to stand, was not final order in case and was not appealable.

2. Courts 404

Statute allowing appeals only from final orders, except in limited class of cases, cannot be avaded by device of asking court to issue one of extraordinary writs, such as certiorari, mandamus or prohibition.

George H. Ward, Asheville, N. C.

(John G. McMaster, Columbia, S.C., on brief), for petitioner.

John L. Nettles, Darlington, S.C.
(James P. Mozingo, III, Darlington, S.C. on brief), for respondent.

Before PARKER, Chief Judge, and Soper & Dobie, Circuit Judges.

PER CURIAM.

This is a petition for a writ of certiorari to review an order of the District Court granting a new trial as to damages while permitting the remainder of a verdict establishing liability to stand. Plaintiff contends that he was knocked down at a street crossing by cars of the railway company which started suddenly as the result of being bumped by a switch engine. Defendant contends that plaintiff, while drunk, had crawled under the cars to get out of the rain and was injured when they were moved. Plaintiff's testimony as to how the injury occurred was uncorroborated and was contradicted by prior inconsistent statements which he had made to a number of witnesses and which corroborated defendant's version of the matter. Plaintiff was terribly injured, having one leg and a portion of the other foot cut off. The jury awarded him damages in the sum of $5,000. Defendant contends that this was clearly a compromise or sympathy verdict, as the jury would undoubtedly have awarded a very much larger sum if it had believed that a real case of liability on the part of defendant had been established, and that the court should not have set aside the award as to damages without setting aside the entire verdict, and thus giving plaintiff on the new trial

awarded the benefit of the testimony which had manifestly been considered by the jury on the issue of damages instead of on the issue of liability, where it should have been considered.

(1, 2) It is clear that the order which we are asked to review is not a final order in the case and hence is not appealable. And we do not think that the statute which allows appeal only from final orders, except in a limited class of cases, can be evaded by the simple device of asking this court to issue one of its extraordinary writs, such as certiorari, or mandamus or prohibition. Columbia Boiler Co. of Pottstown v. Hutcheson, 4 Cir., 222 F.2d 718; Hartford Accident & Indemnity Co. to use of Silva v. Interstate Equipment Corporation, 3 Cir., 176 F.2d 419, certiorari denied 338 U.S. 899, 70 S.Ct. 250, 94 L. Ed. 553; United States Alkali Export Ass'n v. United States, 325 U.S. 196, 65 S.Ct. 1120, 89 L.Ed. 1554.

We think, however, that in the interest of the prompt disposition of this litigation, we should say, in line with our action in Carolina Mills, Inc., v. Corry, 4 Cir., 206 F.2d 76, and Ford Motor Co. v. Milby, 4 Cir., 210 F.2d 137, that all the judges of this court are of opinion that, on the record in this case, the verdict should not have been set aside as to damages without being set aside in its entirety; and that this will be held reversible error if the case should hereafter come before us on appeal from final judgment. See United Construction Worker et al. v. Haislip Baking Co., 4 Cir., 223 F.2d 872. As said by Chief Justice Rugg of Massachusetts in Simmons v. Fish, 210 Mass. 563, 97 N.E. 102, quoted with approval by this court in Schuerholz v. Roach, 4 Cir., 58 F.2d 32, 34:

" 'It is inconceivable that any jury, having agreed upon the issue of liability, should have reached such a determination as to damages. They had no right to consider the subject of damages until they had settled the liability in favor of the plaintiff. The verdict itself is almost conclusive demonstration that it was the result not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision. The inference is irresistible that it could have been reached only by certain of the panel conceding their conscientious belief that the defendant ought to prevail upon the merits in order that a decision might be reached. It is possible that a trial judge might let such a verdict stand for various reasons, as for instance if on the whole it should appear to him that a verdict for the defendant ought not to have been set aside. But it would be a gross injustice to set aside such a verdict as to damages alone against the protest of a defendant, and force him to a new trial with the issue of liability closed against him when it is obvious that no jury had ever decided that issue against him on justifiable grounds. Although the decision of a motion for a new trial rests within the discretion of the trial court * * * it is a sound judicial and not an arbitrary discretion which must be exercised. A failure in this regard is subject to revision.' "

The case is not like Southern Ry. Co. v. Neese, 4 Cir., 216 F.2d 772, where this court granted a partial new trial on the issue of damages under Rule 59(a), Fed. Rules Civ. Proc. 28 U.S.C.A. on the ground that the award of damages there was not sustained by the record. There the party against whom the issue of liability was found could not

have suffered from the granting of the new trial on the issue of damages. Here it will almost certainly result in injustice to the party against whom the finding of liability is allowed to stand. The jury, manifestly, awarded plaintiff a small verdict out of sympathy for his suffering and without regard to the question of real liability. To allow such a verdict to stand on the question of liability and allow damages to be assessed on the basis of plaintiff's injury without reference to the question of liability would, in such a case, be likely to result in grave injustice. The learned judge below doubtless took the action that he did in the thought that such action was required by the decision in the Neese case; but, if so, this was erroneous.

As to the order which we are asked to review is not final, the trial judge has power to reconsider his action in granting same; and he may think proper to do so in the light of what is here said.

The petition for writ of certiorari will be denied.

Petition denied.

MOTION

NOW COMES the defendant Southern Railway Company and moves the Court that the Order heretofore signed by this Court setting aside the award made by the jury in the amount of $5000.00 and permitting the remainder of the verdict establishing liability to stand, be reconsidered by the Court, and that said Order be modified and amended by setting aside the verdict establishing liability against this defendant in accordance with the suggestions made by the

United States Court of Appeals for the Fourth Circuit when this cause was before said Court on a Petition filed by the defendant asking the Court to grant a Writ of Certiorari.

This 19th day of September, 1955.

Respectfully submitted

SOUTHERN RAILWAY COMPANY, Defendant

By .....

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
SOUTH CAROLINA
COLUMBIA DIVISION

C. A. 3938

Frank J. Madden,
Plaintiff

v.

Southern Railway Company, a
Corporation,
Defendant

ORDER

The above case is before me upon the following motion by the defendant: "Now comes the defendant Southern Railway Company and moves the Court that the Order heretofore signed by this Court setting aside the award made by the jury in the amount of $5000.00 and permitting the remainder of the verdict establishing liability to stand, be reconsidered by the Court, and that said Order be modified and amended by setting aside the verdict establishing liability against this defendant in accordance with the suggestions made by the United States Circuit Court of Appeals for the Fourth Circuit when this cause was before said Court on a Petition filed by the defendant asking the Court to grant a Writ of Certiorari."

After consideration of the argument of counsel upon the above motion, it is my opinion that the motion should be denied, and

IT IS SO ORDERED.

. . . . . .

/s/ C. C. WYCHE
United States District Judge

Dated:
Spartanburg, South Carolina
November 2, 1955.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

C. A. 3938

FRANK J. MADDEN,
Plaintiff

vs.

SOUTHERN RAILWAY COMPANY, a CORPORATION,
Defendant

OBJECTIONS AND EXCEPTIONS

Now comes the Southern Railway Company, defendant in the above entitled action and objects and excepts to the Order made and entered in this cause by his Honor C. C. Wyche, District Judge, dated at Spartanburg, South Carolina, November 2, 1955, in which said Order the Court refused to grant defendant's Petition and Motion asking that the Order heretofore entered fixing liability against the defendant, be set aside.

The defendant Southern Railway Company, in making and filing its objections and exceptions to said order dated as aforesaid, reserves its right to bring forward its objections and exceptions at such time as this defendant, under the law, will be permitted to perfect an appeal to the

United States Circuit Court of Appeals for the Fourth Circuit.

This November 4, 1955.

SOUTHERN RAILWAY COMPANY

By .....

Suite 1000 Security Federal Bldg.
Columbia, South Carolina

.....

319 Legal Building, Asheville, N. C.
ATTORNEYS FOR DEFENDANT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C. A. 3938

FRANK J. MADDEN,
Plaintiff

vs.

SOUTHERN RAILWAY COMPANY, A CORPORATION,
Defendant

MOTION TO RECONSIDER ORDERS HERETOFORE MADE AND FOR A NEW TRIAL

Now comes the defendant Southern Railway Company and moves the Court:

(1)—That the order heretofore signed by this Court on the 29th day of April, 1955, setting aside the award made by the jury against the defendant of $5,000.00, and permitting the remainder of the verdict fixing liability against this defendant, to stand, and the subsequent order dated November 2, 1955, denying defendant's motion for a new trial on the issue fixing liability, be reconsidered by the Court and that said orders be modified and amended by setting aside the verdict establishing liability against the defendant, in accordance with the suggestions made by the United States Court of Appeals, for the Fourth Circuit in its opinion filed in this cause on July 14, 1955, copy of which opinion is hereto attached; and

(2) Failing in the above, the defendant moves the Court for judgment in accordance with the verdict of the Jury.

In support of and as grounds for said motion defendant states that a reconsideration and modification as prayed for above, would be in conformity with the previous opinion of the Circuit Court of Appeals for the Fourth Circuit, and would prevent grave injustice to this defendant, and would result in great saving of court time and expense to both litigants.

This December 29, 1955.

SOUTHERN RAILWAY COMPANY,
DEFENDANT

By .....

January 9, 1956.

Re: Madden v. Southern Railway Company—C. A. 3938

Mr. Ernest L. Allen, Clerk,
U. S. District Court,
Charleston, South Carolina.

Dear Ernest:

I return herewith copy of Motion to Reconsider Orders Heretofore Made and For a New Trial in the above case sent to me in your letter of January 4th.

I have already heard this motion one time and passed on it and I do not care to hear it again.

Yours very truly,

C. C. WYCHE
United States District Judge

cc:

George H. Ward, Esq.
John Gregg McMaster, Esq.
James P. Mozingo, III, Esq.

[Caption Omitted]

C. A. No. 3938

MOTION FOR NEW TRIAL

The defendant, Southern Railway Company moves the Court that the judgment rendered by the jury in this action on the 27th day of February, 1956, be set aside and that the defendant be awarded a new trial for that:

(A) The verdict as rendered by the jury in the amount of $75,000.00 was excessive, was not based on the evidence, and was rendered through sympathy.

(B) That the Court erred in setting aside the verdict of the jury in the amount of $5,000.00 rendered on November 5, 1954, and the judgment entered thereon on the 8th day of November, 1954, and in refusing to set aside the verdict fixing liability, and in permitting and allowing said case to be tried at the present term of Court solely on the issue of damages;

(C) That the Court erred in refusing to set aside the verdict fixing liability against the defendant Southern Railway Company, in conformity with the opinion rendered by the United States Court of Appeals for the Fourth Circuit, as reported in 224 Fed (2) 320;

(D) That the verdict is excessive in that there was no evidence to support a recovery in such amount;

(E) That the verdict was so excessive that the only inference that can be drawn therefrom is that it was based upon passion, prejudice and caprice.

This 3 day of March, 1956.

Respectfully submitted

SOUTHERN RAILWAY COMPANY

BY .....

.....

Attorneys for Southern Railway
1000 Security Federal Building

Columbia, S.C.

ORDER

C/A 3938

I have for consideration the defendant's motion to set aside "the judgment rendered by the jury in this action on the 27th day of February, 1956", upon grounds stated in writing and lettered from (A) to (E). Grounds (A), (D) and (E) properly should be considered together. In them it is claimed that the verdict of the jury was excessive, not based on evidence but upon sympathy, passion, prejudice and caprice. In my opinion there is not one scintilla of evidence in the record to warrant the inference that the jury's verdict was based upon prejudice, passion, caprice or sym-

pathy. The evidence showed beyond any question that the plaintiff had lost one leg from the knee down and the heel of the other leg. There was testimony, not contradicted, that the plaintiff could not use a cork leg because the loss of the heel on the other leg made it impossible for him to balance himself. He is therefore remitted to a lifetime of locomotion on crutches or in a wheel chair. Even if it were my province to estimate and fix the damages suffered by the plaintiff I could not in good conscience say that $75,000.00 is excessive for the injuries which he has received and which will attend him throughout life, if indeed his injuries may not result in shortening his life.

Grounds (B) and (C) of defendant's motion relate solely to action taken by another Judge upon a prior trial of this case. I find that these grounds are contradictory. Upon a former trial the jury returned a verdict of $5000.00 for plaintiff, the amount of which was set aside as utterly inadequate by Judge Wyche. The defendant now says that the verdict for $5000.00 should have been allowed to stand. Defendant also says that Judge Wyche should have set aside the verdict for $5,000.00 in its entirety because there was no proof of liability. The defendant can't be right both times. If the original verdict should have been allowed to stand it is because liability was established. If it should have been set aside it is because there was no liability proved. The defendant is blowing both hot and cold. Defendant argues that the original verdict should have been set aside by me because the Circuit Court of Appeals advised that course of action when this case was before it, as shown by the opinion reported in 224 Fed. (2) 320. As to that, the advice was given to Judge Wyche, not to me,

and I am in no sense an appellate court authorized to review the action of Judge Wyche.

Defendant's Motion for a new trial should be overruled and it is so

ORDERED

This 14th day of March, 1956.

GEORGE BELL TIMMERMAN
United States District Judge

OBJECTIONS AND EXCEPTIONS

Now comes the Defendant, Southern Railway Company, and objects and excepts to the Order made and entered in this cause by His Honor George Bell Timmerman, District Judge, dated March 14, 1956.

GEORGE H. WARD
Legal Building
Asheville, N. C.

JOHN GREGG McMASTER
Security Federal Bldg.
Columbia, S.C.

Attorneys for Defendant

Columbia, S.C.
March 15, 1956

[Caption Omitted]

C.A. No. 3938

NOTICE OF APPEAL

Notice is hereby given that Southern Railway Company, defendant above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Order of Judge C. C. Wyche dated December 8, 1953, refusing the defendant's motion to change the venue in this action from the Columbia Division, Eastern District of South Carolina, to the United States District Court for the Western District of North Carolina, at Charlotte, North Carolina for trial; that the defendant also appeals to the United States Court of Appeals for the Fourth Circuit from the judgment of Five Thousand ($5,000.00) Dollars entered in this action on November 8, 1954; that the defendant also appeals to the United States Court of Appeals for the Fourth Circuit from the Order of Judge C. C. Wyche, dated April 29, 1955, denying the defendant's motion for a judgment N.O.V., for a new trial, and if a new trial be granted it be granted as to all issues, and in granting the plaintiff's motion for a new trial limited to the issue of damages; that the defendant also appeals to the United States Court of Appeals for the Fourth Circuit from the Order of Judge C. C. Wyche, dated November 2, 1955, denying the defendant's motion that the former order of the Court be modified and amended by setting aside the verdict establishing liability against the defendant in accordance with the opinion of the United States Court of

Appeals for the Fourth Circuit in Southern Railway Co. v. Madden, (No. 7034) 224 Federal (2) 320; that the defendant also appeals to the United States Court of Appeals for the Fourth Circuit from the Order of Judge George Bell Timmerman issued in open court on February 10, 1956, denying the defendant's motion to amend the order of Judge Wyche dated November 2, 1955, so as to conform with the opinion of the Court of Appeals for the Fourth Circuit, to wit: Southern Railway Co. v. Madden (NO. 7034) 224 Federal (2) 320.

Notice is also hereby given that Southern Railway Company, defendant above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the verdict rendered in this case on February 27, 1956, and from the final judgment entered in this action on February 28, 1956, and from the order of Judge George Bell Timmerman dated March 14th, 1956, denying defendant's motion for a new trial.

George H. Ward
Legal Building
Asheville, N. C.
Attorney for Defendant

John Gregg McMaster
1000 Security Federal Bldg.
Columbia, S.C.
Attorney for Defendant

Columbia, S.C.
March 15th, 1956

QUESTIONS INVOLVED AND ERRORS ASSIGNED IN U. S. COURT OF APPEALS

1. Did the Court err in permitting plaintiff, appellee, to introduce, over defendant's objection, two letters from Claim Agent of the Railroad to plaintiff, of March 26, 1951 and March 28, 1951? (App. 183-184).

2. Did the Court err in refusing to charge the jury as requested by Southern Railway Co. appellant, that the doctrine of Last Clear Chance was not applicable to the facts in this case?

3. Did the Court err in refusing to give to the Jury the Special Instructions as requested by appellant, Southern Railway Company?

4. Did the Court err in modifying certain of the requests for special instructions tendered by defendant Southern Railway Company?

5. Did the Court err in charging the jury in accordance with plaintiff's Requests for special instructions?

6. Did the Court err in refusing to sustain defendant's motion for judgment of nonsuit and directed verdict made at the close of plaintiff's evidence and renewed at the close of all the evidence? (App. 192).

7. Did the Court err in refusing to grant defendant's motion for judgment notwithstanding the verdict, or for a new trial, dated November 15, 1954? (App. 193).

8. Did the Court err in setting the verdict aside solely on the issue of damages, retaining the case for trial with

liability fixed against Southern Railway Company, appellant?

9. Did the Court err in refusing to set aside the verdict on all issues, if it set the same aside on any issue, in accordance with various motions filed on behalf of appellant? (Motion November 15, 1954, App. 195; Motion September 19, 1955 App. 200; Motion December 29, 1955, App. 202).

10. Did the Court err in signing the orders April 29, 1955, (App. 196); Order November 2, 1955 (App. 200); Order January 9, 1955 (App. 205); Order February 10, 1956 (App. 205 through 210, specifically line 9 bottom page 210)?

11. Did the Court err in refusing to grant appellant's motion for change of venue?

LETTERS DOGGETTE TO MADDEN

March 26, 1951

Mr. Frank Madden
204 Westfield Street
Greenville, S.C.

Dear Mr. Madden:

I got your letter, and I am much obliged.

I talked with my big boss about you last week. I am having a touch time trying to get what I want for you, but

I am still trying. I am writing back to the Washington office about you, today. I will let you hear from me again in a week or so. Best Regards

Very truly yours

Doggette

Plaintiff's Ex. 11

March 28, 1951

Mr. Frank Madden

Dear Mr. Madden

Today I made a little headway, and got a little more money. I would like to talk with you again, when you feel like coming to Charlotte.

I am planning a three weeks trip to Arkansas and Tennessee, on business, and hope to leave here around the sixth of April, be back here about the 30th.

Let me know if you plan to be in Charlotte before I go away.

Yours very truly,

Doggette

Plaintiff's Exhibit 12

FORM NO. 8

POLICE DEPARTMENT
OFFENSE REPORT
CHARLOTTE, N. C.

SERIAL NO. 22-765

NAME OF COMPLAINANT: Frank James M[illegible]n

ADDRESS: 125 E. 12th Street

BUSINESS TELEPHONE:

HOME TELEPHONE:

REPORT RECEIVED BY: Hall

OFFENSE: PUBLIC ACCIDENT

PLACE OF OCCURRENCE: 16th & Railroad

CALL ANSWERED BY OFFICERS: Hall-King

OFFICERS ASSIGNED TO CASE:

AT 1:35 A. M. 10-[illegible]-50 10-9-50 TO

DETAILS OF OFFENSE

In response to a call to the above address, we found Frank J. Madden lying beside the railroad tracks. He was found by one Roy Powell, Brakeman for the Southern Railway.

We talked to Mr. Madden at Memorial Hospital, he stated he was walking down the railroad tracks and it started to rain, he crawled upmunder a box car to keep from getting wet. He stated that a Switch Engine cuppled up to the line of cars and started moving.

Mr. Madden's injuries were left foot torn off and right foot badly lascerated, also back and body bruised.

Exhibit B

Charlotte, N. C., Dec. 30, 1950

Accident report: Frank James Madden

I am 49 years old. I was raised in Graniteville, S.C. and am married to Jeanette E. Madden. My home address is No. 3 Montgomery Ave., Greenville, S.C., where my wife lives now, but I left Greenville last July and went to Culpeper, Va., where I worked until about September 15 and came to Charlotte.

I was boarding with my sister, Mrs. R. C. Caudle, at 125 East 12th St. I was working at Spartex Mill in Hoskins, as Loom Fixer, on the third shift, five days a week, making $1.44 an hour, 40 hours a week.

On Sunday night, October 8, I was at home with my brother-in-law, R. C. Caudle, and my sister had gone to Richmond. Some time late at night I remembered that I had promised Ed James, who lives on 16th Street, that I would talk to the boss about getting him back to work. The boss had told me to tell James to come in next morning, and I started walking over to James' house to tell him.

From 12th Street I went down the railroad track. I remember crossing 16th Street and when I got about 700 feet I found that I had missed my street and I turned around to go back to 16th Street. It was pouring and raining, and I had to take my glasses off when they got wet, and I can't hear any too good, and the rain killed the sound of the diesel engine, and I squatted down at the end of a boxcar to get out of the rain, and a switch engine suddenly hooked

to the string of cars, knocking me down pushing several cars over me, but I wasn't hurt at the time.

I didn't think that the diesel engine could go over me, so I hung on to the air hose connections between the cars. The moving cars dragged me along, and we would come to the high places between the tracks where cinders and rocks were piled between the rails, and it whipped me around so that my feet came out over the rail and both feet were mashed by the wheels.

I never did pass plumb out *by* my mind did come and go. The cars stopped after my feet were mashed, and when I heard him apply his brakes I crawled out from under the car, and crawled back up to 16th Street. There was a brakeman at the crossing and I told him I had been hurt, and I asked him could he do anything for me. He called an ambulance and I was carried to Memorial Hospital.

When I was walking from 12th Street down the track to where I got hurt I was all by myself and I did not see anybody at all. I did not see any railroad engines anywhere and there was not anybody around to talk to. I got about 700 feet the other side of 16th Street when I detected that I had passed the street, and I started back but it had started to rain so hard that I had to look for shelter, and the only place to get out of the rain was under the end of the boxcar.

I had not done any drinking that day. I was not drunk and I was perfectly able to take care of myself.

I expect to leave the hospital today. My left leg was *em-*

putated above the ankle and my right foot was injured and is still in a cast.

"I have read this entire statement and it is correct to the best of my knowledge and belief."

(signed) Frank J. Madden

Charlotte, N.C.
Dec. 30, 1950

Louis E. Doggette, witness